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THE LOGIC OF LEGAL THEORY: REFLECTIONS ON THE PURPOSE AND METHODOLOGY OF JURISPRUDENCE

Aaron Rappaport[*]

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INTRODUCTION

De Tocqueville once observed that Americans are a practical, action-oriented people, generally skeptical of abstract endeavors. "Men who live in democratic communities not only seldom indulge in meditation," de Tocqueville noted, "but they naturally entertain very little esteem for it."[1] Perhaps this explains a phenomena experienced by many who engage in legal philosophy, which is the skepticism expressed by colleagues and friends about the "value" of their work.[2]

Legal theorists are themselves somewhat to blame for this reaction, for their analyses often seem divorced from real world concerns. Consider, for example, the dominant school of Anglo-American jurisprudence in the twentieth century, which is sometimes called "analytical jurisprudence." The major writers in the field—and here I am thinking of Hans Kelsen, Ronald Dworkin and H.L.A. Hart—espouse complex, highly abstract legal theories. Their work is nearly unpenetratable to the uninitiated, and even legal scholars admit to feeling disoriented and confused.[3]

Kelsen's *Pure Theory of the Law*, Dworkin's invocation of a superhuman interpreter called Hercules, and Hart's construct of primary and secondary rules all seem to unfold in a world far removed from everyday concerns.[4] The student, citizen, lawyer or judge might rightly ask, "How do these address the practical concerns of citizens or lawyers or judges or policymakers today? What, in short, is the point and purpose of legal philosophy?"

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[1] *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 43 (Phillips Bradley ed., Alfred A. Knopf 1976) (1834); *see also id.* at 3 ("I think that in no country in the civilized world is less attention paid to philosophy than in the United States.").

Neil Duxbury reports that jurisprudence has a similarly poor standing in English legal circles. *See* Neil Duxbury, *The Narrowing of English Jurisprudence,* 95 MICH. L. REV. 1990, 1990-91 (1997). Lord Denning once confessed that "[j]urisprudence was too abstract a subject for my liking. All about ideologies, legal norms and basic norms, 'ought' and 'is,' realism and behaviourism: and goodness knows what else. The jargon of the philosophers of law has always been beyond me." *Id.* at 1990 n.1 (quoting ALFRED DENNING, THE FAMILY STORY 240 (1981)). Lord Denning would not be pleased to know that "basic norms," "ought" and "goodness" itself will be touched upon in this Article.

[2] *See, e.g.,* PHILIP SOPER, A THEORY OF LAW 1 (1984) (arguing that legal theory has reached a "dead end"); *see also* JUDITH N. SHKLAR, LEGALISM (1964) (similar).

[3] *See, e.g., infra* note 109 (noting commentary discussing the difficulty in understanding and making sense of Kelsen's theory); *infra* note 148 (similar for Dworkin).

Asking these questions is entirely appropriate and desirable. Legal philosophy will reach a broad audience only when theorists are able to make an argument for its relevance in addressing practical legal questions.[5] And yet, demonstrating the value of the discipline to colleagues or to the public at large is not the only, or perhaps even the primary, reason to clarify the purposes of legal theorizing.[6] That effort is essential because identifying the theoretical goals remains the only way for legal philosophers to avoid confusion and ambiguity in their own analyses of the law.

---

[4] Philip Soper has made precisely this point. As he wrote,

> When one compares the conclusions of current legal theorists with the actual function of the judge, it is clear that judges are no better equipped to determine the law in difficult cases with the theorists' definitions than they are with unreflective definition. Master test, rule of recognition, basic norm, and law of nature—all these are concepts far too abstract to be used in actually deciding cases. Indeed, candid theorists usually confess that the picture of the law they paint is not meant to be representational even in the judge's chambers.

SOPER, *supra* note 2, at 5.

[5] Kenneth Einar Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 OKLA. CITY U. L. REV. 41, 42-43 (2002).

> A philosophical theory that does not purport to explain, systematize, and deepen our understanding of some significant feature or property of the world is irrelevant and likely to fade quickly and quietly from the scene. . . . If a philosophical theory does not tell us something meaningful about our world that comports with intuitions to which we assign a high confidence level, it is doomed—and rightly so.

Id.

[6] I am sure that many who are engaged in legal theory believe that they are doing something worthwhile, and they do not care a whit if the public understands or cares about what they are doing. *See* James Allan, *Internal and Engaged or External and Detached?*, 12 CAN. J. L. & JURIS. 5, 15 (1999) (noting that, in doing legal theory, the theorist "seems implicitly to be asserting, or at least to be pre-supposing, that his undertaking is worth doing—and so to be asserting its goodness"). Indeed, some may think there is something almost heroic about the lone scholar working for truth, without any public recognition.

One of the central disputes in legal theory today concerns "methodology." Theorists like Hart, Kelsen and Dworkin "do" legal theory in slightly different ways. For example, Dworkin uses a method that requires theorists to identify the moral basis for legal materials.[7] Kelsen, by contrast, denies that moral principles have much of anything to do with understanding law's nature.[8]

How are we to assess which method is "better?" For that we need some standard of evaluation, some way of determining which theory does a "better" job. And to answer that question, we need to ask, "A better job at *what*? What is the point of theorizing about the law?" After all, we will not be able to identify a "method" of jurisprudence, unless we know what the method is being used for. One cannot decide which analytical tools are best employed until one is clear about the function and goal for which that tool is to be used.[9]

An initial step in bringing some clarity to the field of jurisprudence, therefore, is for theorists to be clear about the purpose of their analyses and to articulate the implications of that purpose for legal theory's methodology. Unfortunately, few theorists have confronted this challenge directly. There has been a remarkable dearth of writing—in an area where there is no dearth of words—about the point and purpose of the exercise itself.[10] As a result, it is difficult to evaluate how well theorists' methods serve their underlying purposes.

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[7] *See infra* Part VIII.

[8] *See infra* Part VII.

[9] *See* SOPER, *supra* note 2, at 6 ("Instead of trying to infer the purpose of legal theory from the existing literature on the subject, it may be more profitable to ask directly what purpose legal theory ought or could be made to serve."); Ruth Gavison, *Comment*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 21, 34 (Ruth Gavison ed., 1987) ("Generally speaking, criteria of adequacy for theories of law cannot be uniform. Adequacy is a relative idea: we must always know the tasks we want the theory to fulfil in order to judge its adequacy.").

It is even conceivable that disputes among legal theorists are really not disputes at all. It is possible that legal theorists are really answering different questions—one is trying to determine how to hammer a nail, the other how to turn a screw. Each might be employing the correct methodologies, given their differing objectives. *See infra* Part I (discussing false debate between some theorists about the conventional meaning of the term "law").

[10] As one commentator recently observed:

This Article seeks to encourage a conversation about the overriding purposes and, ultimately, the appropriate methodology of legal theory. The approach will be constructive: I will make an argument for a distinct theoretical objective and then explain how that objective calls for a distinct methodology. At the same time, the Article will have a critical component, too. The constructive argument will be used to critique the methodological coherence of two leading theorists—Ronald Dworkin and Hans Kelsen. The result will be to shine some light on what legal theorists are actually doing—and what they should be doing—when they do legal theory.

A brief road map of the discussion may prove helpful. In Part One, I suggest that one can identify an appealing purpose for jurisprudence relatively easily. To be useful, jurisprudence must help to answer questions that citizens care about, and citizens care deeply about a variety of normative questions. These are "should" questions, questions about how citizens *should* behave, how laws *should* be interpreted and how cases *should* be decided.

The difficult challenge is to identify a methodology that can help address these normative questions, or at least help us think more clearly about them. I argue in Part Two that an appropriate methodology is available, one that might be called "rational reconstruction." That methodology seeks to identify the implicit premises of legal claims; it is a methodology designed to encourage individuals to deliberate more openly and more reflectively on the underlying assumptions they hold about the law.

The methodology of rational reconstruction leads to a series of important, if somewhat counterintuitive, insights about legal claims, which are discussed in Parts Three and Four. Part Three suggests that normative claims about the

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> All legal theorists take an implicit stand on meta-theoretical or methodological questions such as [the purpose of the theorizing endeavor]. Few, however, address such matters directly, and to the extent to which this does occur, the authors concerned often confine themselves to some relatively brief remarks in the course of pursing some other agenda.

JULIE DICKSON, EVALUATION AND LEGAL THEORY 2 (2001).

law must rest implicitly on a moral principle. Even more controversially, Part Four contends that the moral principle must be of a certain sort—it must be a unitary, objective principle of morality.

These conclusions conflict with a traditional tenet of positivism, the idea that law and morality have no necessary nexus. Given this conflict, Part Five steps back and considers whether positivism retains any vitality as a jurisprudential theory. The discussion concludes that positivism continues to play a part—though a limited one—in delineating the scope of the rationalizing endeavor.

With the core features of rational reconstruction articulated, Part Six offers a practical illustration of how the methodology operates, applying it to a debate over the nature of civil disobedience. As this Part demonstrates, rational reconstruction helps explain why some theorists are mistaken in believing that citizens have an independent obligation to obey the law. The analysis demonstrates how careful attention to the purpose of jurisprudence and a clear understanding of the relevant methodology helps untangle the web of intuitions that citizens have about this fundamental philosophical issue.

The last two parts of the paper contrast the methodology of rational reconstruction with the methodologies used by two of the most influential legal theorists of the twentieth century—Hans Kelsen and Ronald Dworkin. Part Seven examines Hans Kelsen's *Pure Theory of the Law*, and Part Eight assesses Ronald Dworkin's "constructive" approach to interpretation. These parts highlight how each theorist adopts a methodology that resembles the methodology of rational reconstruction in notable respects, yet each also departs from the rationalizing approach in several critical and ultimately unjustified ways. The analysis underscores how the failure to confront the underlying purpose of jurisprudence can lead to confusion and ambiguity in jurisprudential methods.

Before turning to the body of this enterprise, a brief comment about the aspirations of this article may be useful. My goal here is primarily Socratic in nature; I am interested in provoking legal theorists to question their own assumptions about the goals and methods of jurisprudence. One way to encourage a conversation about underlying assumptions is to take a stand on the subject—to make a case for a certain jurisprudential objective and to show how that objective entails a distinct methodology. That is what I have done, and my hope is that it will inspire others to take a stand on these issues in turn.

Since a primary criticism advanced in this paper is that legal theorists have failed to make their implicit premises explicit, I have tried myself to be as explicit as possible about the core elements of my analysis. Where complex and contested legal concepts are employed, I have attempted to offer my own definitions. Where assumptions are made, I have tried to be open about them. Whenever possible, I have tried to use straightforward language. I join Philip Soper in the belief that "the closer one sticks to plain talk in analyzing ethical concepts, the less prone one is to that peculiar kind of philosophical error whose technical name is 'nonsense.'"[11] Clarity of language is a discipline to encourage clarity of thinking. But most importantly, it will allow others to understand, evaluate and critique the theory outlined in these pages with greater ease.

I. THE PURPOSE(S) OF JURISPRUDENCE

Legal theory during the twentieth century has been preoccupied with questions about the nature or concept of "the law."[12] This is, at first glance, a strange sort of question. Ordinarily, when we speak about the nature of an entity—like "water"—we assume that the concept refers to some objective thing, say H_20. But the term "law" does not have a similarly fixed meaning. Rather, in everyday usage, the term means different things in different contexts.[13]

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[11] SOPER, *supra* note 2, at 13.

[12] *See* LLOYD'S INTRODUCTION TO JURISPRUDENCE 47 (M.D.A. Freeman ed., 6th ed. 1994) ("[M]uch juristic ink has flowed in an endeavour to provide a universally acceptable definition of law . . . ."); *see also* Stanley L. Paulson, *Introduction* to NORMATIVITY AND NORMS xxx (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1998) ("When Kant . . . poses the classical philosophical question, 'What is law?', he is following a juridico-philosophical tradition that extends over two millennia.").

[13] Ronald Dworkin, *A Reply by Ronald Dworkin, in* RONALD DWORKIN AND

Consider, for example, an individual who asks his lawyer a tax question: "Is deducting medical expenses against the 'law'?" Here, we might suppose, the defendant is using the term "law" in a positivist sense; he wants to know whether he will be punished for deducting medical expenses. He is not interested in assessing whether the tax rule on the subject is justifiable in any moral or legal sense. If we focused solely on this context, we might follow Holmes or Austin in saying that law represents the coercive command of a sovereign, and that we should treat law from the perspective of the "bad man" who is only concerned with punishment and pain.[14]

By contrast, we might consider an individual arguing about how the Supreme Court should resolve an upcoming case concerning, say, religious freedom. Suppose the individual asserts that the case should be resolved in favor of the plaintiff because that is the "law." The issue here is different from the first example. Here, the individual is using the term "law" to refer to the result he believes is "justified." He is implying that the Court is under an obligation, a duty, to resolve the case in a specific way. In this context, we are not only interested in the perspective of the "bad man" whose focus is on punishment, but also on the "good man" who feels a sense of obligation to reach the right decision.[15]

CONTEMPORARY JURISPRUDENCE 247, 251 (Marshall Cohen ed., 1983) ("There is no standard use of the words 'legal' or 'law' . . . ."); Gavison, *supra* note 9, at 21 ("We use the word 'law' in a variety of meanings and contexts."); *see also* Granville Williams, *The Controversy Concerning the Word "Law," in* PHILOSOPHY, POLITICS AND SOCIETY 155 (Peter Laslett ed., 1956) ("The only intelligent way to deal with the definition of a word of multiple meaning like 'law' is to recognize that the definition, if intended to be of the ordinary meaning, must itself be multiple.").

[14] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Id.; *see also* Philip Soper, *Legal Theory and the Problem of Definition*, 50 U. CHI. L. REV. 1170, 1190-92 (1983) (discussing Austin's perspective).

[15] *See* Soper, *supra* note 14, at 1190-92 (distinguishing between perspectives of

A common critique of positivist notions of the law is that they fail to account for the good man's way of speaking about the law. Theorists seeking to explain how law might be justified or obligatory have pursued different strategies. For example, commentators embracing traditional natural law theories argue that the law is justified when it is based on moral principle.[16] By contrast, analytical theorists, such as Hans Kelsen and H.L.A. Hart, attempt to account for this sense of the law without relying on moral claims. All of these theorists agree that the command theory does not capture the full meaning of the word "law" as used in linguistic practices.

Much ink has been spent trying to assess whether law is best understood from the perspective of the good man or the bad man. But if the goal of these theories is to identify the conventional way that the term "law" is used in legal discourse, both theories are correct. The term "law" does not have any essential or fixed meaning. It is a term used by human beings in the midst of specific enterprises for different purposes. And so the term's meaning depends on context and on the purpose for which the word is used.[17]

That means that if the purpose of legal theory is this linguistic objective, then the battle between positivists and normative theorists may be a phony one. They might both be right, depending on the context. Sometimes individuals use the term "the law" to refer to predictions about the use of government sanctions, and sometimes they use the term to

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the "good man" and the "bad man").

[16] *See* Alf Ross, *Validity and the Conflict Between Positivism and Natural Law*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 151.

> Despite manifold divergencies, there is one idea common to all natural law schools of thought: The belief that there exist universally valid principles governing the life of man in society, principles that have not been created by man but are discovered, *true* principles, binding on everyone, including those who are unable or unwilling to recognize their existence.

Id.

[17] *See* Williams, *supra* note 13, at 152 (noting fallacy that "words have not only a proper meaning but a single proper meaning. This involves a denial of the fact that words change their meanings from one context to another. . . . The misconception again comes from supposing that there is an entity suspended somewhere in the universe called 'law' . . . .").

refer to the sense that certain kinds of rules or decisions are obligatory. And this is not surprising. We often use the same term in different ways in different situations.[18]

But there is a deeper question that needs to be asked, and that is the question whether legal theory *should* seek to identify the conventional meaning of the term "law." Indeed, such a linguistic goal seems notably unsatisfying. It would relegate theorists to producing a kind of dictionary, in which the various meanings of the term "law" are identified and listed, perhaps with some explanation of how the various meanings apply in different contexts, communities and historical periods.

Moreover, if this is jurisprudence's goal, the methodology adopted by theorists would be rather mundane. We might expect theorists, for example, to engage in surveys or interviews to discover what terms are thought to mean in a community. Needless to say, that is not the kind of analysis most legal theorists undertake. Rather, it is fair to say that most theorists have more ambitious theoretical ambitions than creating a dictionary of legal terms.[19] Indeed, it would seem odd if the heated debates among legal theorists today turned simply on whether their theories accurately captured the conventional understanding of legal terms employed by the public or the legal profession.

But if theorists do not seek to capture linguistic meaning, what is their goal? To help address that question, we need to step back and consider in a more general way the kinds of objectives that theorists might possess when analyzing the law.

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[18] *See infra* Part III.A (discussing how terms like "should" and "ought" are used in different ways in different contexts).

[19] Dworkin writes: "none but the most trivial theory of law could possibly be understood as an account of the linguistic conventions governing the concept's use." Dworkin, *supra* note 13, at 256; *see also* SOPER, *supra* note 2, at 3 ("[W]ho cares? What is the point of marking off the distinguishing features of legal systems?").

A. Empirical Questions

The purposes of theorizing can be divided into two sets of objectives, which might be called "empirical" and "normative" goals. Empirical goals attempt to identify *facts* about the world. Attempts to identify the conventional meaning of a term like the "law" is an illustration of an empirical objective, for that effort seeks to identify facts about the term—how the term is used by members of the community at large (or a portion of that community).[20] Other empirical goals can be identified easily. A historian might be concerned with identifying past facts, such as the ideological commitments of a Supreme Court Justice during the Civil War. A practicing attorney might be interested in assessing future facts, such as the likelihood that a client will be sanctioned by the government for taking certain actions. These goals differ in their temporal focus—whether they focus on past, present or future events. They are all empirical, however, in their attempt to identify factual events that have happened, are happening or will happen.

Plainly, the methodological tools adopted by an individual will depend in part on the nature of the empirical objective pursued. For example, the professional attorney attempting to assess the likelihood of government sanctions will utilize the methodological tools familiar to lawyers counseling clients. The lawyer might look at the record of past decisions as a way of predicting the future path of the law.[21] She might explore the psychologies and records of individual judges on a court in order to determine their likely actions. She might even analyze cultural trends on the belief that such trends influence judicial decision making.

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[20] As Himma has written, "[d]efinitional claims are, thus, primarily empirical in character; to determine the truth-value of such a claim one must go out into the world and see how people, as an empirical matter, use the relevant terms." Himma, *supra* note 5, at 44.

[21] As Oliver Wendell Holmes wrote:

> The object of our study . . . is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall.

Holmes, *supra* note 14, at 457.

Efforts to address historical questions, by contrast, will adopt different methods. For example, one who is interested in Justice Holmes' views on the First Amendment would use the typical tools of historical analysis—examination of primary and secondary materials concerning the subject of interest. Conversely, one who is interested in current facts about the legal profession—say, an assessment of how elected judges today are influenced by public opinion—would need to undertake a different methodological approach, such as an effort to compare the conduct of elected and unelected judges facing similar legal questions.

Empirical goals in short, can come in many different varieties and can differ in their temporal focus. All of these empirical goals are likely to be interesting to some people some of the time. One who finds them appealing will be justified in choosing a methodology that is tailored to achieving them.

At the same time, none of these empirical goals seems to capture what lies at the heart of jurisprudence today. Legal theorists, after all, do not seem interested ultimately in predicting the future path of the law, charting its historical roots or identifying the conventional meaning of legal terms. It is hard to see how these practical endeavors lend themselves much to "theorizing" at all.

Moreover, those empirical pursuits are commonly thought to fall within the province of other disciplines or fields. Predictive analysis, for example, is the stuff of typical law school courses but not philosophy of law courses. Historical analysis seems more appropriately pursued by legal historians. Linguistic analysis seems better suited to, well, linguists. Given this conclusion, we might naturally ask whether the second set of objectives—normative objectives—might serve as the ultimate goal of legal theorizing.

B. Normative Questions

The term "normative," like many words, has a varied meaning. For our purposes, normative questions refer to "should" questions, questions about how individuals or institutions should act.[22] I will have more to say about the meaning of "should" statements a bit later; for now it is enough to suggest that normative statements are a way of saying that an individual or institution has a duty or obligation to act in a certain way.[23] A statement that a decision is "justified" or "good" is a normative statement if it implies that a decisionmaker is, was or will be under an obligation to reach a certain decision. Thus, the claim that a legal right to assisted suicide is justified typically means that a court should rule in that way.

Normative (or "should") statements should be distinguished from empirical (or "is") statements. Normative statements are claims about how we are obligated to act. Empirical statements are different; they simply tell us how the world *is* (or *was* or *will be*). To be sure, normative claims might rely, in part, on empirical judgments. To assess whether the current Supreme Court jurisprudence on privacy is "justified" we need to have some empirical knowledge about what the Supreme Court said. But normative claims, unlike empirical ones, are not *simply* questions about the facts. They also require an evaluation of whether those facts are authorized, justified or obligatory.

Unlike empirical goals, normative questions offer an appealing object for an independent discipline called jurisprudence.[24] The most contentious and vibrant disputes about the law today involve normative disputes—about how individuals, courts and other institutions *should* act.[25] Moreover, many of the perennial questions of legal theory are normative in precisely this way, questions about civil disobedience, judicial review, constitutional interpretation and punishment. When should individuals disobey the law? Is the Court justified in exercising judicial review? How ought the Court interpret the Constitution? When and how should the government punish law breakers?[26] Jurisprudence would be a powerful discipline, indeed, if it could help us answer, or at least think more clearly about, these difficult issues.

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[22] *See, e.g.*, CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY 8 (Conora O'Neill ed., 1996) ("[Normative statements] make *claims* on us; they command, oblige, recommend, or guide. Or at least, when we invoke them, we make claims on one another. When I say that an action is right I am saying that you ought to *do* it . . . ." (footnote omitted)); *cf.* H.L.A. HART, THE CONCEPT OF LAW 6, 85 (2d ed. 1994) (discussing law and obligation); GRAHAM WALKER, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT 13 (1990) (noting that all normative statements advance an implicit argument about the existence of an obligation). "[T]he word 'obligation' "etymologically relates particularly to the 'binding force' (*ligare*, to bind) of promissory or quasi promissory commitments." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 297 (H.L.A. Hart ed., 1980).

[23] *See infra* Part III.A (discussing nature of normative statements).

For purposes of this paper, therefore, my working assumption will be that addressing these normative questions is the overriding objective of legal theory. The following sections attempt to trace out the implications of that objective for the jurisprudential method. One who finds this objective appealing will be interested in exploring the methods used to address normative questions.

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[24] Some theorists have suggested that normative and empirical questions exhaust the kinds of questions that can be asked about the law. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 824 (1935).

> Fundamentally there are only two significant questions in the field of law. One is, "How do courts actually decide cases of a given kind?" The other is, "How ought they to decide cases of a given kind?" Unless a legal "problem" can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense.

Id.; *see also id.* at 828-29 (arguing that we should look at the real life implications of words, rather than treating them as some kind of abstract entity). I am sympathetic to that position, though demonstrating its truth is not necessary here. My goal is to encourage theorists to be explicit about the purposes their methodology is serving, whether or not that purpose can be classified as normative or empirical in nature.

[25] *Cf.* WALKER, *supra* note 22, at 4 ("[A]ll the important arguments in the field of constitutional theory are normative.").

[26] The debate over when and whether civil disobedience is justified is a common topic of discussion in philosophical texts. *See, e.g.*, JURISPRUDENCE (Stephen E. Gottlieb ed., 1993); PHILOSOPHY OF LAW (Joel Feinberg & Hyman Gross eds., 5th ed. 1995); THE PHILOSOPHY OF LAW (Frederick Schauer & Walter Sinnott-Armstrong eds., 1996). Similar debates persist about the justification for judicial review and about the proper method of constitutional interpretation. *See* Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1207 (1984) (noting that debates over the justification for judicial review remain an "obsession of constitutional law scholarship"); Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 FORDHAM L. REV. 1469, 1470 (1997) ("[H]ow ought the Constitution to be interpreted? That is one foundational question of constitutional law, and it tends to have the lion's share of attention.").

At the same time, no one is obligated to agree that this is the ultimate goal of jurisprudence. Those who are interested in a different set of questions, such as questions about the conventional meaning of legal terminology, will find the analysis in the following pages uninteresting. Nonetheless, the broader point advanced in these pages remains—legal methodology follows from the goals of legal theory. Those who embrace a different jurisprudential method have a responsibility to identify the ultimate purpose of their endeavor and to explain how their favored methodology promotes that goal.

II. THE RATIONALIZING METHODOLOGY OF JURISPRUDENCE

We have assumed for the sake of argument that the goal of legal theory is to address normative questions. On this assumption, a jurisprudential method will be useful if it helps us answer—or at least think more clearly about—these kinds of "should" questions. Thus, the question we need to ask is, "What methods are best suited for addressing the normative objectives of legal theory?"

A. Prescriptive Methods

One answer is that such a methodology should help us identify authoritative principles that answer the important "should" questions—whether citizens should obey the law, how courts should interpret the law, how government should enforce the law. This might be called a prescriptive, or "top-down," approach. This approach is extremely ambitious; it aspires to tell us nothing less than the justified result.

An obvious difficulty with this approach is that the content of the authoritative principles is disputed. It is not obvious how one would go about proving which principles are authoritative, or even what *kinds* of principles provide authoritative answers. Consider, as an illustration, the on-going debate about the appropriate methods of interpreting the Constitution.

To interpret the Constitution, we need some principle of interpretation. Do we focus on the original intent of the Framers, the conventional meaning of the text or some other element? The difficulty is that we cannot derive those principles of interpretation from the Constitution itself, since reading the document requires a commitment to an interpretive method. That means that principles of interpretation, if they are to be justified, must rely on principles independent from, transcending, the Constitution.

What kind of principles? Moral principles offer one possibility. But moral principles themselves are endlessly disputed. We do not agree on basic issues of morality and the Good, nor do we agree on how standards of justification should apply to specific disputes.[27] Lacking agreement on ultimate standards of justification, we seem to have no persuasive way to resolve these and other normative disputes.[28]

This conclusion seems to undermine, or at least raise serious doubts, about the possibility of a useful normative jurisprudence. But before we despair for the discipline of jurisprudence entirely, we might consider an alternative approach. This method has more modest aspirations than the top-down approach. Rather than attempting to identify the "right" answer, the method seeks to help us think about these normative questions in a more intelligent, comprehensive and reflective manner. The methodology might be called "rational reconstruction."

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[27] Thus, one theorist can assert that homosexuality is immoral, while another can take precisely the opposite position. *Compare, e.g.,* John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, *in* NATURAL LAW, LIBERALISM AND MORALITY 1, 9 (Robert P. George ed., 1996) (arguing that the public promotion and facilitation of homosexual activity impedes "human goods"), *with* Stephen Macedo, *Against the Old Sexual Morality of the New Natural Law*, *in* NATURAL LAW, LIBERALISM AND MORALITY, *supra*, at 28 (Robert P. George ed., 1996) ("affirming the good" of homosexual relationships).

[28] It is partly for this reason that some scholars, like Richard Posner, have concluded that moral theorizing is by its nature useless and futile. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 131 (1999) ("Even if there is an objectively correct answer to every moral question . . . , the answer will appear arbitrary because there is no reasoning process that a judge might follow that would strike a detached observer as furnishing objective justification for the answer."); *see generally* Aaron J. Rappaport, *Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy*, 2001 UTAH L. REV. 441, 445.

B. The Methodology of Rational Reconstruction

Rational reconstruction does not attempt to identify authoritative principles that dictate how individuals should act. Rather, the method seeks to make the implicit premises of legal claims explicit.[29] Arguments in support of any claim are, by definition, comprised of implicit premises.[30] The premises are what an individual must accept as true in order to assert that a claim is persuasive. Rational reconstruction attempts to expose these premises so that individuals can consider them more openly and reflectively. This goal—of making implicit premises explicit—is a central objective of traditional philosophical analysis.[31]

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[29] *See* JERRY CEDERBLOM & DAVID W. PAULSEN, CRITICAL REASONING 47-52 (2001) (stating that the method of "reconstruction" aims to make implicit premises explicit); Zenon Bankowski et al., *On Method and Methodology*, *in* INTERPRETING STATUTES 9 (D. Neil MacCormick & Robert S. Summers eds., 1991) (discussing method of rational reconstruction). This discussion builds upon the introductory comments presented in Rappaport, *supra* note 28, at 445-48, and the more extensive discussion in Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L. J. 557, 563-70 (2003).

[30] NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 21 (H.L.A. Hart ed., 1978) ("[A]n argument . . . purports to show that one proposition, the conclusion of the argument, is implied by some other proposition or propositions, the 'premisses' of the argument.").

[31] *See, e.g.*, FELIX S. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 5 (Greenwood Press 1976) (1933) ("Ethical science involves an analysis of ethical judgments, a clarification of ethical premises."); L.A. Zaibert, *Philosophical Analysis and the Criminal Law*, 4 BUFF. CRIM. L. REV. 101, 101 (2000) ("Philosophical analysis can be viewed as the attempt to clarify concepts by distinguishing their constitutive elements. This clarification seeks to identify the set of necessary and sufficient conditions for a given entity to be an instance of the concept being analyzed."); *see generally* Rappaport, *supra* note 28, at 445 n.18.

R.M. Hare suggests that the term "ethics" should be reserved for these kinds of "logical" or "analytical" inquiries. R.M. Hare, *Ethics*, *in* THE CONCISE ENCYCLOPEDIA OF WESTERN PHILOSOPHY AND PHILOSOPHERS 130 (J.O. Urmson ed., 1960) [hereinafter CONCISE ENCYCLOPEDIA] [hereinafter CONCISE ENCYCLOPEDIA]. Moreover, Hare distinguishes this form of ethical analysis from purely prescriptive or

Rational reconstruction, in this respect, represents a form of logical analysis. To reconstruct a normative claim, an individual begins by assuming, for the sake of the analysis, that the normative claim under consideration is justified. She then attempts to "back out" or "reverse engineer" a rationale for those rules. The rationale will be comprised of premises that, together, entail the conclusion that the decision is justified.

C. *The Rationale of Rational Reconstruction*

How does identifying implicit premises help to promote the normative goals of legal theory? As an initial matter, identifying the premises of a normative claim can help to clarify points of agreement and disagreement among individuals. To illustrate, consider two individuals who disagree whether the Court should establish a constitutional right to homosexual sodomy. Little can be said about the specific nature of the dispute without further analysis of the premises of the opposing beliefs.

Suppose one individual is asked why he supports such a constitutional right, and he responds with this simple argument:

(1) society should be structured to promote human happiness, or "utility";
(2) constitutional protection of sexual contact between willing adults will promote human happiness over the long run;
(3) homosexual sodomy is a kind of sexual contact;
therefore,
(4) homosexual sodomy between willing adults should be constitutionally protected.

Having exposed the premises of the individual's belief, an opponent can more easily identify points of agreement or dis-

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descriptive claims. Thus, he writes: "ethics in the narrow sense [of analytical inquiry] is concerned directly neither with whether polygamy *is* wrong . . . nor with whether anybody in fact thinks it is wrong . . .; it is concerned with the question 'Precisely what is one saying if one says that polygamy is wrong?'" *Id.* at 131; *see also* P.H. Nowell-Smith, *Analysis*, *in* CONCISE ENCYCLOPEDIA, *supra*, at 17 ("[T]he function of philosophy . . . [is] not the acquisition of new knowledge . . . but the clarification and articulation of what we already know.").

agreement. For example, the opponent might agree with the first (moral) premise, but disagree that constitutional protection of sexual contact will promote human happiness, or agree with the first two premises but disagree that homosexual sodomy is a form of sexual conduct. Disagreement, in other words, can occur at many different levels, concerning different premises. By clarifying underlying assumptions, rational reconstruction can help structure debates, focusing attention on the real sources of dispute.

Even more fundamentally, rational reconstruction provides a tool for an individual decisionmaker to reach more thoughtful and considered judgments about normative questions. By making implicit premises explicit, the methodology encourages reflection on the premises of one's beliefs—and, as a result, on the justifiability of a given decision. Thus, if an individual is able to identify a plausible argument for a given claim, the individual can assess the logic of that claim more directly.

In this assessment, the individual is certainly not obligated to endorse the implicit premises of the normative claim.[32] But if she finds the underlying arguments unappealing, or if she is unable to find any plausible argument in support of a given claim, she will necessarily have to reconsider the appeal of the normative claims themselves.[33] Decisions, under these circumstances, are made with full knowledge of their underlying assumptions. Rational reconstruction thus transforms intuitive beliefs into reflective decisions.[34]

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[32] *See* Bankowski et al., *supra* note 29, at 23.

> One must reconstruct the system in view in order to understand and explain it without regard to the question whether it expresses sound values or value-commitments. Good legal description is neither advocacy of the system nor critique of it. Our aim here is good description in this sense, not advocacy or critique.

Id.

[33] As I have discussed elsewhere, rational reconstruction can be viewed as the first step in a common form of philosophical inquiry, a movement towards "reflective equilibrium." Rappaport, *supra* note 29, at 565 n.19 (discussing link between reflective equilibrium and rational reconstruction). Reflective equilibrium occurs when an individual's premises and judgments are in harmony. *See* JOHN RAWLS, A THEORY OF JUSTICE 20 (1971) ("[Reflective equilibrium] is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation."). An initial step in reaching reflective equilibrium is the process of identifying— reconstructing—the premises of one's beliefs. The hope is that, by mak-

D. Clarifications and Qualifications

The rationale for rational reconstruction—to help individuals assess the appeal of normative claims—influences the way in which the methodology is applied. For example, in reconstructing a normative statement, we may find that more than one argument supports the claim. In that situation, which argument should be considered?

The answer is that the individual reflecting on a normative claim should consider the *strongest* argument available.[35] For example, if we are interested in assessing whether the

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ing implicit premises of the system explicit, individuals can make more intelligent and informed decisions.

[34] A core assumption of this methodology is that reflective decisions are more accurate in the long run than unreflective ones. This cannot be proved. To be sure, we can be confident that rational reconstruction provides a kind of knowledge. At a minimum, the methodology highlights decisions that appear to lack any plausible justification. But even with that knowledge, we cannot be certain that the ultimate decision an individual makes will be better after reflection than one made without any thought at all. Thus, the claim that the process of rational reconstruction leads to better decision making is a core epistemological premise of the rationalizing methodology.

That said, one who rejects this assumption must pay a high price. If reflection does not help in making better decisions, then it is not clear how normative debate and discourse can *ever* provide benefits. If reflection has no benefits, then theorizing about the law can aspire to nothing more than rhetoric and advocacy, a tool for promoting one's own fixed positions, without offering any greater insight. Some have adopted such a position. *See, e.g.*, Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) (arguing that, since normative scholars cannot prove the correctness of their positions, their efforts must be viewed as rhetorical efforts to advance their agendas). But one who believes debate and discussion are useful must at least assume the usefulness of the rationalizing endeavor.

[35] To avoid confusion, I am not suggesting here that a definitive external standard is available to determine which rationale is strongest and most persuasive. Rather, the claim here is simply that the individual who is using the rationalizing methodology in order to assess a normative claim should seek to identify the rationale that, in his or her opinion, is strongest. Plainly, this requirement will affect the way the rationalizing methodology is implemented, compared to, say, efforts to identify the worst argument in support of a normative claim.

Supreme Court's ruling concerning homosexual sodomy is justified, we should seek to identify the best possible argument in support of that decision's validity. We should adopt, in other words, a "principle of charitable interpretation."[36]

Why? Why not seek to identify the rationale actually adopted by the decisionmaker in the relevant case? That is to say, why not evaluate the Supreme Court's sodomy decision based on the actual rationale expressed by the Court itself? The answer is that the Court's rationale might be muddled; it might rest on implausible premises. Rejecting that rationale, thus, would not tell us whether we should find the ruling appealing on other grounds, even grounds unforeseen by the Court itself.

Thus, in reconstructing a normative claim, we are not interested simply in identifying the rationale adopted by the claimant.[37] In assessing whether a normative claim deserves our allegiance, we need to evaluate that claim on its most persuasive grounds. We will call the premises of the rationalizing argument "implicit premises" to highlight the fact that they need not be expressly held by the claimant herself.

Before proceeding further, it is useful to distinguish between two different perspectives on normative claims—the internal and external perspectives. The discussion thus far has suggested that, in rationalizing a normative claim, we need to adopt a specific perspective towards that claim. We need to assume, if only for the sake of the analysis, that the claims under analysis are justified. This is what I will call an "internal perspective" on the law.[38]

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[36] *See* Bankowski et al., *supra* note 29, at 20 ("The jurist or scholar has to strive to make the best reasonable sense that can be made of the law as a rationally coherent and generally applicable normative system, though certainly without disguising any irresoluble antinomies present in the system at any time."); *see also* CEDERBLOM & PAULSEN, *supra* note 29, at 28 ("When more than one interpretation of an argument is possible, the argument should be interpreted so that the premises provide the strongest support for the conclusion."); ROBERT P. GEORGE, MAKING MEN MORAL 65 (1993) (adopting the following canon of interpretation: "[S]elect among equally plausible interpretations of a text that interpretation under which the position taken or argument made in the text is more plausible").

Ronald Dworkin has adopted a similar principle of interpretation when he directs individuals to adopt the "best" theory of political morality that can support the existing legal structure. Dworkin's position is discussed further, *infra*, Part VIII.

[37] *See* John Rawls, *Outline of Decision Procedure for Ethics*, 60 PHIL. REV. 177, 185 (1951) (identifying intent of speaker is not the goal of the rationalizing effort).

At the same time, it must be emphasized that this perspective is adopted only for the sake of the rationalizing analysis. An individual is not committed to endorsing the claim.[39] To the contrary, the claim itself should be adopted only if the individual finds the premises to be, on reflection, appealing. When the individual steps back and assesses whether the premises are truly appealing, we might say that she is viewing the claims from an "external," rather than internal, perspective.

Rational reconstruction in this regard is not a *prescriptive* methodology—it does not purport to tell individuals or institutions how they should act. Rather, it is more accurately described as having both *descriptive* and *normative* features. It is normative in the sense that it focuses on "should" statements. But it is descriptive because it attempts to describe the premises of the existing claims without asserting that one must embrace the premises themselves.[40] By making implicit premises explicit, it offers a tool for undertaking a structured assessment of the merits of normative claims.

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[38] Theorists differ on precisely what they mean by an "internal" perspective or point of view. *See, e.g.,* Brian Bix, *Natural Law Theory, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 230 (Dennis Patterson ed., 1999) (contrasting perspectives of John Finnis and H.L.A. Hart). For purposes of this paper, I use the term to refer specifically to the perspective of one who believes that the claims under analysis are justified (*i.e.*, impose categorical obligations).

[39] Bankowski et al., *supra* note 29, at 23.

> One must reconstruct the system in view in order to understand and explain it without regard to the question whether it expresses sound values or value-commitments. Good legal description is neither advocacy of the system nor critique of it. Our aim here is good description in this sense, not advocacy or critique.

Id.

[40] *See id.* at 21-22 ("Rational reconstruction aims at a descriptive account of normative material.").

III. THE PREMISE OF NORMATIVITY

The previous discussion described a methodology—rational reconstruction—that can be employed to address the normative objectives of jurisprudence. The methodology seeks to identify the premises of normative claims about the law. This Part discusses the kinds of premises that are found in the rationalizing effort. The analysis generates an important—and perhaps counterintuitive—insight about the nexus between legal claims and morality.

A. The Nature of Normative Claims

To identify the premises of normative statements, one first needs to clarify what these "should" statements mean. What do individuals mean when they say that a court "should" interpret the Constitution a certain way or a citizen "should" obey the law? In this effort, one cannot simply consult a dictionary for the word "should." Words, we have noted, often mean different things in different contexts, and that is certainly true of words like "should" (or its frequent synonym "ought").

For example, "should" can be used as a statement of "supposition." We might say, "If you want to drive fast, you should push on the accelerator." The word "should" can also be used as a statement of "prediction." For example, we might say: "I hear that it should rain tomorrow."[41]

These are all valid ways to use the word "should," at least if our standard is the conventional use of the term. But those are not the way "should" statements are used in legal debates over how courts should act or individuals should behave. That is to say, these are not the kinds of "should" statements we are interested in analyzing.When someone says that a court "should" interpret the Constitution to find a right to privacy or that an individual should disobey the law, he typically means that the individual has a obligation—a duty—to act a certain way.

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[41] *See* J.L. MACKIE, ETHICS 64-66 (1977) (noting non-moral uses of "ought"); *see also* R.W. Hepburn, *Ought*, *in* THE OXFORD COMPANION TO PHILOSOPHY 638 (Ted Honderich ed., 1995).

This is a duty, moreover, of a certain sort. As an initial matter, the obligations implied by normative statements do not depend on whether or not the individual who is the subject of the duty is aware of their existence. Thus, when I say that the Supreme Court has an obligation to find a right of privacy in the Constitution, I believe that to be true regardless of whether the Supreme Court itself acknowledges the existence of that obligation. Indeed, if the Court fails to recognize the obligation, I say that the Court has erred. In this sense, the obligation transcends the knowledge, belief or preferences of the decisionmaker.

Moreover, the obligation is deemed to exist whether or not a material sanction would follow a violation of the duty. Thus, when I say that the Supreme Court has an obligation to interpret the Constitution a certain way, I believe that the Court has a duty to act even if the Justices suffer no negative consequences for failing to comply with the obligation. We might say that the obligation exists inherently, regardless of whether it is enforced by any other means. To use Aquinas's phrase, the obligation binds "in the conscience" and not by the sword.[42]

We might pause here and recap. What we have found is that an individual making a normative statement is making a statement about an obligation of a distinct kind. It is an obligation that does not depend on the decisionmaker's awareness of, or agreement with, the obligation's application. Nor does it depend on the existence of a material sanction. For ease of reference, I will refer to obligations of this sort as "categorical" obligations.

Lest there be any confusion, I am not claiming that "should" statements necessarily invoke categorical obligations. Rather, at this point, I am simply suggesting that this sort of claim is a common one in legal debates, and that it is the kind of statement that we are interested in analyzing. For the purposes of this paper, therefore, I will assume that normative claims involve categorical obligations.[43]

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[42] THE "SUMMA THEOLOGICA" OF ST. THOMAS AQUINAS Q.96 (Fathers of the English Dominican Province trans., London 1922).

B. Reconstructing Normative Claims

With a clearer picture of the meaning behind normative claims, we can turn to the critical question: What sorts of premises must be adopted to believe that categorical obligations exist? It has been recognized for millennia that normative statements—about how an individual "should" act—cannot be derived solely from factual premises. Normative statements must be grounded on other should statements, on deeper and more general principles that dictate how individuals should act.[44] These underlying principles are the source of the categorical obligations; they are presupposed in the normative claim.

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[43] Individuals are free, of course, to focus on claims that do not involve categorical obligations. But choosing a different kind of claim to analyze will result in different premises. *Cf.* R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 22 (1981).

> It is not necessary to my argument to insist that 'ought' for example, is *never* used non-prescriptively . . . . Many words have various senses . . . . All that is necessary is for there to be a recognizable sense in which it has the properties which I have claimed. People who then ask moral questions *in this sense*—as, I think, we do much of the time—are bound by the logical rules which these properties dictate. If they want to switch to *different* questions, that is up to them.

Id.

[44] JOHN STUART MILL, PHILOSOPHY OF SCIENTIFIC METHOD 355 (Ernest Nagel ed., 1950) (1843) ("A proposition of which the predicate is expressed by the words *ought* or *should be* is generically different from one which is expressed by *is* or *will be*."). Efforts to move from factual premises to normative conclusions is sometimes called the Naturalist Fallacy. It violates the fact that "it simply is not deductively valid to move from premisses about the way things are in the world to conclusions about the way world ought to be." JAMES ALLAN, A SCEPTICAL THEORY OF MORALITY AND LAW 194 (1998); *see also* FINNIS, *supra* note 22, at 37 ("[It is a] logical truth, widely emphasized since the later part of the nineteenth century, that no set of non-moral (or, more generally, non-evaluative) premisses can entail a moral (or evaluative) conclusion.").

Like most philosophical ideas, the is/ought distinction is not universally accepted. Some have suggested that it is possible to move from an "is" to an "ought" under certain circumstances. *See* Georg Henrik von Wright, *Is and Ought*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 368 (discussing proposals by Searle and others to bridge gap). Those positions, however, have suffered from powerful critiques by subsequent commentators. *See id.* at 376-79 (criticizing Searle and others); *see also* MACKIE, *supra* note 41, at 66-72 (discussing and rejecting Searle's proposal).

Consider, for example, the normative statement that the legislature should enact a law barring killing. We might ask: Why "should" killing be prohibited? A utilitarian might respond that killing is wrong (in this case or in general) because killing (in this case or in general) reduces the utility, or happiness, of the community. In this example, utility is a premise of the prohibition on killing.

Now this simple illustration allows us to distinguish various kinds of norms or normative claims. Specifically, the normative claim under analysis—that killing is wrong—might be called an "instrumental" claim, because it is justified in terms of another, higher order principle—in this example, the principle of utility.[45] Utilitarianism is a normative claim, too; it affirms that individuals should act to promote the greatest happiness of the greatest number. But this normative claim is different. For the utilitarian, the greatest happiness principle, by definition, generates obligations inherently.

Utility, in this sense, is the "ultimate" principle of obligation: It has no further justification. At bottom, every normative statement must rest on a core assumption about the source of obligations. I will call this ultimate principle a "moral" principle—a principle that by its very nature generates obligations. Moral principles, then, are any ultimate, non-instrumental principle that generate categorical obligations. Adopting this definition leads to a core insight: *Any* normative claim about how individuals or courts "should" act (in the categorical sense) must rest on a moral principle.[46] Normative claims presuppose moral principles.[47]

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[45] *See* Nicholas Dent, *Instrumental Value*, *in* THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 41, at 410 ("Some item has instrumental value just to the extent that it lends itself (fortuitously or by design) effectively to the achievement of some desired or valued purpose.").

[46] Graham Walker has put this complex point in simple terms: "[P]rescription implicates . . . a moral premise. For prescription implies a morally compelling standard empowering prescription." WALKER, *supra* note 22, at 10.

[47] Some may feel that I have linked law and morality by adopting a very broad definition of moral principle. But that is a semantic dispute of no consequence. The point here is simply that, in order to make claims about categorical obligations, one must believe that some principle exists that generates obligations

C. An Objection

This conclusion sometimes triggers a common, but misplaced, objection. The objection takes issue with the claim that normative statements necessarily rest on moral premises. That claim cannot be true, the argument goes, because one can easily identify factual premises for normative claims.

For example, one might say that, when an individual makes a normative claim, he is simply making a statement about his or her own emotional reaction to given phenomena.[48] Thus, when one individual says that "capital punishment should be abolished," he is simply expressing his own negative emotional reaction to capital punishment.[49] When another individual disagrees and says that "capital punishment should be retained," she is simply expressing her own positive feelings about the practice. The normative claims, in short, are simply factual statements about the speaker's "psychological state"—in this example, states of approval and disapproval triggered by the practice of capital punishment.[50] Normative claims, thus, do not rest on moral premises; they reflect (empirical) states of being.

In theory, of course, someone might use "should" statements in this way, but it is not the way normative statements are used in legal debates. Most notably, this interpretation undermines the very idea that the speakers are engaged in any conflict. According to this interpretation, the claimants are simply making reports about their emotional states. As a result, both of their claims may be true without any inconsistency.[51]

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inherently. If one would prefer to use a different term to refer to that principle—say "categorical values"—he or she may do so without affecting the analysis.

[48] This view—that normative statements represent statements about an individual's emotional state—is sometimes called "subjectivism." *See* R.W. Hepburn, *Objectivism and Subjectivism, Ethical*, *in* THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 41, at 631-32 (stating that one version of subjectivism is the idea that "moral judgments [are] simply individual avowals of feeling"); *see also* Hare, *supra* note 31, at 134-36 (describing "subjectivism" and distinguishing it from non-descriptivist theories, like "emotivism").

[49] This discussion is drawn from D.D. RAPHAEL, MORAL PHILOSOPHY 24 (1994).

[50] HARE, *supra* note 43, at 76.

[51] *Id.* at 77 (noting that if the speaker's psychological state were all that

But, of course, this does not make sense of this interaction (or legal debates in general). The speakers really are disagreeing. When they affirm that capital punishment should be abolished or preserved, they are not merely stating facts about themselves. Rather, they are making a claim that policymakers or courts are under an obligation to act a certain way, and that this obligation is *binding* on these individuals. They are claiming that individuals who feel differently about the subject are *wrong* and that contrary beliefs should be changed.[52] The empirical explanation for the speakers' views does not—and cannot—account for this sense of obligation.[53] Normative claims, in short, must rest on moral premises, for only moral premises can explain the existence of binding obligations.

Again, to avoid confusion, let me emphasize that I am not affirming that moral principles *really* exist. That would be a statement from an external perspective, about the true nature

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normative claims represented, then "two people who had different moral opinions about the same act . . . would not really be disagreeing with each other; each would be stating that *he* had a certain attitude or feeling . . . and these statements would be mutually consistent"); *see* FELIX E. OPPENHEIM, MORAL PRINCIPLES IN POLITICAL PHILOSOPHY 24-28 (1968) (similar).

[52] *See* W.D. Ross, *Critique of Ayer*, *in* MORALITY AND THE GOOD LIFE 69, 70 (Thomas L. Carson & Paul K. Moser eds., 1997).

> [If statements were] mere expressions of liking or disliking [then] why argue at all? What should we be trying to prove? . . . What they are attempting to do . . . is to convince each other that the liking, or the dislike, is justified, in other words that the act has a character that *deserves* to be liked or disliked, is good or is bad.

Id. John Stuart Mill foresaw this debate. He observed:

> It is true that, in the largest sense of the words, even [should] statements assert something as a matter of fact. The fact affirmed in them is that the conduct recommended excites in the speaker's mind the feeling of approbation. This, however, does not go to the bottom of the matter; for the speaker's approbation is no sufficient reason why other people should approve, nor ought it to be a conclusive reason even with himself.

MILL, *supra* note 44, at 355.

[53] As R.M. Hare affirms, to view normative statements simply as statements about an individual's psychology "make[s] impossible moral disagreements which we all know exist." HARE, *supra* note 43, at 77. Hare concludes that, "[b]ecause of this objection, the view has been generally abandoned." Hare, *supra* note 31, at 135.

of reality. Our goal is to reconstruct claims from the internal perspective. That endeavor simply asks what an individual must assume in order to make a categorical "should" statement. The answer is that individuals must assume the existence of moral principles, as we have defined the concept. The analysis of normative claims, in this sense, is inevitably an exercise in moral philosophy.

D. Intermediate Assumptions

The insight of the previous sections—that every normative claim must rest on a moral premise—does not mean that *only* moral premises will be found when reconstructing those claims. Rather, arguments in support of normative claims will often require the adoption of certain "intermediate" assumptions as well. These are assumptions about the nexus between the underlying moral principle and an instrumental normative claim.

Consider again the prescription: "Do not kill innocent human beings." We previously noted that, for the utilitarian, the moral premise underlying this statement is the greatest happiness principle. But utilitarianism is not, alone, sufficient to justify the prescription. One must also assume an additional, intermediate assumption—that killing really will diminish happiness. The need for this intermediate assumption is underscored by the logical possibility that one might agree with the utilitarian moral premise, yet conclude that happiness is actually promoted by killing an innocent person (say, to save the lives of other innocent people).[54]

In short, any argument in support of a normative claim necessarily has a moral premise at its foundation. In some cases, it will also include an intermediate assumptions that explains how a given claim serves the moral premise. The ultimate goal is to identify those moral and intermediate assumptions that together entail the conclusion that the relevant normative claim is justified. This might be called a requirement of "vertical consistency" or of "fit." The premises must generate arguments that "fit"—are vertically consistent with—the claim under analysis.

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[54] For a discussion of the difference between moral and intermediate assumptions in the criminal sentencing context, see Rappaport, *supra* note 29, at 569-70.

IV. THE NATURE OF THE MORAL PREMISE

We have thus far identified a methodology to serve the normative objectives of jurisprudence, and we have made some headway in identifying the kinds of premises—including moral premises—that underlie those claims. In this Part, we will explore in greater detail the nature of these underlying moral principles.

A. Relativist and Objective Moral Principles

Moral principles are commonly divided into two broad categories—relative and objective principles. We might naturally wonder which of these two categories best characterizes the moral premises that underlie normative claims. Although a definitive answer is not possible here, the following analysis suggests that objective principles offer a much more plausible basis for rationalizing normative beliefs about the law.

Consider relativist principles first. Relativism holds that moral principles are defined in terms of the values held by some portion of individuals in a society.[55] A common form of relativism links moral principles to the values held by a majority or supermajority of a community, an approach that might be called "conventionalism." Here, values are "relative" to the community's beliefs.

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[55] The doctrine of relativism has been interpreted in various ways, so it is easy to be confused about its relevance to the present study. Relativism is sometimes used in the sense of "cultural relativism, a theory of anthropology or sociology." OPPENHEIM, *supra* note 51, at 174. In this sense, relativism is merely a statement about the world—that different communities have different moral codes. It is not a statement about obligation-producing principles. For our purpose, the doctrine that interests us is "ethical relativism," which is the idea that "everyone has the moral duty to conform to the moral and political principles which happen to be prevalent in his society." *Id.* at 176; *see also* R.W. Hepburn, *Ethical Relativism, in* THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 41, at 758 (defining ethical relativism as "[t]he view that moral appraisals are essentially dependent upon the . . . practices and norms accepted by a social group at a specific place and time"). In this sense, ethical relativism imposes categorical obligations. The moral principles prevalent in a society generate real obligations that individuals should obey whether or not they are aware of those obligations and whether or not sanctions will follow from disobedience.

Conventionalism is a highly controversial theory of morality. Some theorists question whether it offers a coherent basis for normative statements at all.[56] Others point to serious practical difficulties in utilizing conventionalist theories, noting difficulties in defining the scope of the relevant community.[57] These are powerful critiques, and raise serious questions about the appeal of a relativist theory. But my intent here is not to assess whether those challenges are successful. The question I want to ask is whether relativism serves as a plausible basis—a plausible reconstruction—for core intuitions individuals have about the law. The answer, as many commentators have concluded, is "no."[58]

Consider the implications of the conventionalist theory for some of the most fundamental questions of jurisprudence, such as questions involving civil disobedience, judicial review and constitutional interpretation. Conventionalism, for example, faces profound difficulties in justifying civil disobedience, for it does not provide a basis for critiquing the community's norms. Under a conventionalist account, one can never be justified in practicing civil disobedience, at least where the law at issue is endorsed by the community.

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[56] As Gilbert Harman notes, critics attack relativism by defining it as the assertion that "(*a*) there are no universal moral principles and (*b*) one ought to act in accordance with the principles of one's own group, where this latter principle, (*b*), *is* supposed to be a universal moral principle. It is easy enough to show that this version of moral relativism will not do." Gilbert Harman, *Moral Relativism Defended*, 84 PHIL. REV. 3, 3 (1975) (citing BERNARD WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS 20-21 (1972) and MARCUS SINGER, GENERALIZATION IN ETHICS 332 (1961)). Harman finds this criticism unconvincing, and so do I. Relativism can be rehabilitated by disputing the first premise. Rather than (a), one might define relativism as resting on a single universal moral principle: "One should act according to the principles of one's own group." In this limited sense, relativist theories have an objective feature. The relativist's belief in the single universal principle holds true regardless of what people think. That is to say, ethical relativism, as I am using it here, rests on the assumption that the principles of the group generate real (objective) obligations.

[57] *See* WILLIAM A. GALSTON, LIBERAL PURPOSES 25-28 (1993) (raising questions about relativistic beliefs whenever disputes exist within a group or among several groups). David Lyons raises concerns about the possibility of relativist accounts generating internally conflicting prescriptions. *See* David Lyons, *Ethical Relativism and the Problem of Incoherence*, 86 ETHICS 107, 107-08 (1976).

[58] *See* ROBERT A. DAHL, PREFACE TO DEMOCRATIC THEORY 36 (1956) ("[N]o one except its enemies has ever defined democracy to mean, that a majority would or should do *anything* it felt an impulse to do." (emphasis added)); Tony Honoré, *The Basic Norm of a Society*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 91-92 (attacking view that obligations exist just because the community thinks that they do); David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy*, 30 HASTINGS L.J. 957, 977 (1979) ("[N]ot everything invoked by democratic majorities as justified by 'public morality' is, in fact, morally justified.").

Similarly, a relativist account has difficulty explaining how judicial review as currently practiced is justified. In exercising their review power, courts commonly act in a countermajoritarian way—that is, in conflict with the majoritarian orientation of conventionalist morality.[59] Finally, conventionalist accounts of value have odd implications for constitutional interpretation. Arguably, conventionalism suggests that, as the public's views about interpretive practices shift, so should the court's favored approach to constitutional interpretation.

In offering these comments, I am not claiming that conventionalism (or relativism generally) is false from an external perspective. My claim here is simply that conventionalism cannot serve as a plausible reconstruction of common normative beliefs citizens have about the law. Perhaps someday conventionalism will be found to be the "correct" moral principle. But if so, common intuitions about legal practices would need to be discarded. In the meantime, if one believes that civil disobedience, judicial review and interpretive practices are justified, one must look for a non-relativist moral premise, principles that transcend community belief. One must believe, in short, in "objective" moral principles.

Objective principles are moral principles that are thought to exist whether or not they are endorsed by any individual or group of individuals.[60] They exist, in a sense, in "the fabric of the universe."[61] Utilitarianism is a classic example of an objective principle. For a utilitarian, the greatest happiness principle is believed to be true, regardless of what human beings happen to believe about the nature of morality. Indeed, for a utilitarian, that principle would be true even if everyone on earth were persuaded to embrace a different concept of value.

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[59] Commentators have attempted, nonetheless, to reconcile majoritarianism and judicial review. Perhaps for obvious reasons, these efforts have not been entirely persuasive. For a discussion of a few notable attempts, see Rappaport, *supra* note 28, at 471-76.

[60] The belief that objective moral principles exist is sometimes called "moral

Objective principles, in turn, are often divided into consequentialist and deontological categories. Roughly speaking, consequentialism is the idea that a decision is justified so long as, on balance, the decision generates consequences that promote public "welfare."[62] Utilitarianism is a common form of consequentialism; it holds that the measure of good consequences is "utility."[63]

Deontological theories are different. This moral tradition rejects the idea that decisions are justified based on their consequences for society. Rather, and again speaking roughly, decisions are justified based on some inherent moral quality of the act or actor himself. There are, of course, many variants of deontological theory; Kant's moral theory is widely considered to be one of the most influential illustrations of this approach.[64]

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realism." *See* Jeremy Waldron, *The Irrelevance of Moral Objectivity*, *in* NATURAL LAW THEORY 158, 158 (Robert P. George ed., 1994) (asserting that the moral realist believes that "[t]here are facts which make some moral judgements (that is, some statements of value or principle) true and others false, facts which are independent of anyone's beliefs about the matters in question"); *see generally* DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 14-36 (1989) (discussing realism and conventionalism in ethics).

[61] RONALD DWORKIN, LAW'S EMPIRE 267 (1986) (criticizing the idea).

[62] *See* Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1206 n.45 (2000) ("Under a consequentialist theory of punishment, the criminal law's system of prohibitions is morally justified as a whole by virtue of its optimizing social welfare.").

[63] Utilitarians have traditionally equated utility with the experience of pleasure or pain. Some theorists, however, have favored an approach that incorporates alternative measures of the human good. *See* David O. Brink, *Utilitarian Morality and the Personal Point of View*, 83 J. PHIL. 417, 422 (1986) (contrasting utilitarian theories that rely on "subjective" conceptions of welfare with those that rely on "objective" conceptions); *see also* RICHARD NORMAN, THE MORAL PHILOSOPHERS: AN INTRODUCTION TO ETHICS 108 (2d ed. 1998) (contrasting hedonistic and "Platonic-Aristotelian" strands of utilitarianism).

[64] *See* Brian Orend, *Kant on International Law and Armed Conflict*, 11 CAN.

Objective moral principles do not suffer from the same defects as relativist accounts of morality. For example, objective principles offer a plausible basis for justifying civil disobedience and judicial review.[65] They capture the sense that obligations are real and independent of the passing beliefs of any group of individuals. For these and other reasons, many theorists conclude that "objective" moral principles are presupposed by normative claims of obligation. As the philosopher J.L. Mackie put it:

> [O]rdinary moral judgments include a claim to objectivity, an assumption that there are objective values . . . . And I do not think it is going too far to say that this assumption has been incorporated in the basic, conventional, meanings of moral terms. Any analysis of the meanings of moral terms which omits this claim to objective, intrinsic, prescriptivity is to that extent incomplete . . . . [66]

Following Mackie, I will proceed with the view that only objective moral principles are capable of supporting the kinds of

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J. L. & JURIS. 329, 333 (1998) (concluding that, despite some debate, "the standard reading of Kant as a deontologist retains considerable plausibility").

[65] Some of the most famous efforts to justify civil disobedience have relied upon the demands of objective morality. *See, e.g.*, Martin Luther King, Jr., *Letter from Birmingham Jail, reprinted in* WHAT COUNTRY HAVE I? 117 (Herbert Storing ed., 1970) (justifying civil disobedience in terms of the objective moral principles of natural law). Similarly, a range of theorists have argued that only objective morality can provide a coherent basis for judicial review. *See, e.g.*, Michael S. Moore, *Law as a Functional Kind*, *in* NATURAL LAW THEORY, *supra* note 60, at 188, 230 ("justification of judicial review is a wild and unseemly scramble" for any but those who believe in objective moral principles).

[66] MACKIE, *supra* note 41, at 35; *see also id.* at 31 ("objectivism about values . . . has . . . a firm basis in ordinary thought, and even in the meanings of moral terms"). Mackie ultimately rejects the reality of objective moral principles. But he does so as an "external" critique, not as an analysis of moral terms. In effect, he argues that objective moral principles are implicit in ordinary moral discourse, but that we are all wrong in believing such principles exist. *Id.* at 35.

> [T]he denial of objective values will have to be put forward not as the result of an analytical approach, but as an 'error theory,' a theory that although most people in making moral judgments implicitly claim, among other things, to be pointing to something objectively prescriptive, these claims are all false.

Id. Nothing I say here is meant to dispute Mackie on this point. But if he is right, then one might question whether normative discourse is feasible.

normative claims we hope to make about the law.

B. Unitary and Hybrid Theories of Morality

The previous section reveals an important insight: Categorical obligations most plausibly presuppose the existence of objective moral principles. This section addresses a separate and important issue, which concerns the *number* of objective moral principles that can lie implicit in a rationalizing argument.

Many individuals have an intuition that a multiplicity of conflicting moral principles exist. We like the idea—so eloquently articulated by Isaiah Berlin—that there is an irreducible plurality of values.[67] Theories that rest on this belief might be called "hybrid" theories of morality, to distinguish them from "unitary" or "monistic" theories that rest on a single moral principle. The question we need to ask is this: Can hybrid theories serve as a plausible basis for justifying normative claims?

1. Reconstructing a Single Normative Claim

In answering that question, one might begin by considering a practical example—the attempt to reconstruct a single normative claim about how much punishment an offender should receive.[68] Many criminal theorists today argue that a compelling punishment theory must be a hybrid theory, which incorporates both utilitarianism (a consequentialist principle) and retribution (a deontological approach).[69] A hybrid theory such as this one, however, faces serious difficulties in justifying punishment decisions.

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[67] *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 169 (1969).

[68] The discussion here represents an abbreviated version of the argument presented in a separate article. *See* Rappaport, *supra* note 29, at 621-30.

[69] For recent efforts to develop hybrid theories, see Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003). *See also* Richard S. Frase, *Limiting Retributivism: The Consensus Model of Criminal Punishment* (forthcoming; copy on file with author) (describing broad consensus in support of hybrid approach to criminal punishment). The Reporter for the ALI's new sentencing project had endorsed a hybrid theory of punishment, as well. *See generally* Kevin R. Reitz, *American Law Initiative, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525 (2002).

A core problem is that, for a great many punishment decisions, utilitarianism and retribution conflict. Consider the common practice of giving criminals sentencing discounts when they help law enforcement agencies prosecute criminals.[70] Utilitarianism offers a ready justification for this practice, since the sentencing discount potentially helps law enforcement fight crime in society. But retributivists have difficulty justifying the sentencing rule, since they cannot readily explain why punishment should be reduced for conduct unrelated to the crime of conviction.[71]

Given the conflict, how can hybrid theorists justify the claim that the sentencing discount is appropriate? A common approach is to argue that utilitarian and retributive considerations should be weighed against each other to reach the justified result. For example, one might argue that greater weight should be attached to utilitarian considerations, so that consequentialist considerations trump deontological concerns in this case.

This approach will not salvage hybrid theories of justification. The problem is straightforward. If we assume that the punishment decision is justified, then some principle must exist to justify integrating utilitarianism and retribution in a specific manner.[72] That principle, moreover, must itself be viewed as the ultimate source of value in the system, if it is to explain how and when obligations arise.[73] The implication is that consequentialist and deontological norms are relevant to the extent, and only to the extent, that they serve this higher principle.[74] In other words, to justify any choice, one must assume that conflicting principles are commensurable in terms of a higher principle, and we must assume that the higher principle is the ultimate source of value.[75]

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[70] *See* Rappaport, *supra* note 29, at 571-73 (discussing the practice).

[71] *See id.* at 573-77 (discussing justifications for viewing a defendant's "substantial assistance" as a mitigating factor at sentencing).

[72] After all, if the principle generates arbitrary conclusions, the ultimate result would not be justified (*i.e.* obligatory). *See* Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 906 (2000) (affirming the proposition that "the difference between what is morally right and what is morally wrong cannot be arbitrary" (quoting Anthony Ellis, *Deontology, Incommensurability and the Arbitrary*, 52 PHIL. & PHENOMENOLOGICAL RES. 855 (1992))).

[73] The higher principle essentially resolves any conflict between utilitarian and retributive principles. *See* HARE, *supra* note 43, at 26 ("[T]here is a requirement that we resolve the conflict [among moral duties], unless we are to confess that our thinking has been incomplete.").

In this way, the hybrid theory collapses into a unitary theory of morality. John Stuart Mill made precisely this point a hundred years ago. As he wrote,

> [t]here must be some standard by which to determine the goodness or badness, absolute and comparative, of ends or objects of desire. And whatever that standard is, there can be but one; for, if there were several ultimate principles of conduct, the same conduct might be approved by one of those principles and condemned by another, and there would be needed some more general principle as umpire between them. Accordingly, writers on moral philosophy have mostly felt the

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[74] To make any sense of the analysis, we must recharacterize utilitarian and retributive concepts in terms of the higher principle. For example, in the sentencing context, the principle that integrates the utilitarian and retributive principles must be either consequentialist or deontological itself. If it is consequentialist, then the retributive principles must be reconsidered. After all, retribution as a deontological principle does not acknowledge the existence of some higher moral principle that determines the relevance and importance of retributive claims. To value retributive sentencing rules based on their promotion of good consequences, in other words, is to transform this deontological principle into an instrumental element of a consequentialist doctrine.

Nor can the hybrid arrangement be salvaged by treating the higher principle as a deontological value. The consequences of a punishment decision would have no relevance in such a situation. We have already posited, however, that the principal justification for the sentencing discount is its tendency to promote good consequences. Thus, if the higher principle really is a deontological principle, these considerations should be irrelevant.

[75] Theorists sometimes call principles that can be integrated along a shared metric "commensurable" concepts, while principles that do not share a common scale are often called "incommensurable" rationales. *See* Rappaport, *supra* note 29, at 624 n.216 (defining "incommensurability").

The view that incommensurability precludes justified choice is probably the conventional view among philosophers. *See* Rappaport, *supra* note 29, at 627 n.222 (providing citations). Richard Warner puts the point bluntly: "When we encounter incommensurable reasons in crucial areas of public policy, we cannot do what we should do: Choose the option supported by the [morally] best reasons." Richard Warner, *Does Incommensurability Matter?: Incommensurability and Public Policy*, 146 U. PA. L. REV. 1287, 1287 (1998).

> necessity not only of referring all rules of conduct and all judgments of praise and blame to principles, but of referring them to some one principle, some rule or standard with which all other rules of conduct were required to be consistent, and from which by ultimate consequence they could all be deduced.[76]

As Mill recognized, any effort to justify a normative claim must ultimately rest on a single overriding moral principle that provides the ultimate justification for each normative claim.[77]

Needless to say, this conclusion does not mean that morality is, *in fact*, unitary. It may be the case that, in reality, morality is hopelessly fragmented and contradictory, shifting like light refracted in a turning piece of glass. The argument presented here is made from an internal perspective, not an external one. The claim, in other words, is simply that, *if* we believe that a claim is justified, it cannot rest on a hybrid theory of morality.

2. *Reconstructing Multiple Normative Claims*

The previous section suggests that a single normative claim must be premised upon a single principle of morality. This point can be extended further to situations where one seeks to reconstruct several different normative claims at once. Suppose, as an illustration, one is interested in rationalizing a set of sentencing rules—say, the United States Sentencing Commission's rules regarding drug crimes and homicide.[78]

An important question is whether one can believe, without contradiction, that different moral principles underlie different sentencing rules. For example, suppose one believed that utilitarianism justifies the sentencing rules for drug crimes, while retribution justifies the rules for homicide. Is this approach internally consistent?

An initial answer is: Why not? The moral principles do not seem to conflict—utilitarianism applies to one set of rules and retribution to another. The problem, however, is that moral principles are not easily quarantined: They aspire to universal application.[79] As a result, if utilitarian principles apply to drug crimes, one would expect them also to apply to murder crimes. If they do not, if retribution alone governs the murder rules, one must implicitly believe that retribution trumps utilitarianism in this context. Again, to justify such a belief, a further moral principle must be assumed. That higher principle represents the ultimate principle of morality. Thus, as before, the hybrid theory inevitably collapses into a unitary moral theory.

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[76] MILL, *supra* note 44, at 356-57.

[77] *See* HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 121 (1997) (discussing link between incommensurability and monism).

[78] *See* Rappaport, *supra* note 29 (rationalizing the U.S. Sentencing Commission's guideline decisions).

The implication is that any effort to reconstruct one *or more* normative claims must rest on a single moral principle. That insight suggests that the reconstruction of these claims must possess a distinct architecture. First, it means that each individual normative claim must rest on a single moral principle, which provides the ultimate grounds of justification. As noted previously, this is the requirement of "vertical consistency."[80] Second, the analysis suggests that conflicts among mid-level, instrumental norms must be reconcilable in terms of the higher principle, and ultimately in terms of a single moral norm. This might be called the requirement of "horizontal consistency."

A theory that satisfies both vertical and horizontal consistency is a theory that provides a moral argument for each decision, as well as a principle for resolving any apparent conflicts among the rationales.[81] Such a theory might be called a fully

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[79] Universality is a widely accepted feature of moral principles. *Cf.* R.M. HARE, FREEDOM AND REASON 16-21 (1963) (discussing universality of moral principles). Although this is not the place to offer an extended defense of this aspect of morality, a brief comment on the topic may be useful. In effect, the universality of moral principles makes sense in light of our discussion of hybrid theories. Suppose a principle, P, is limited in its scope so that it applies only to situation X, but not Y. If that limitation is justified, one would need a principled rationale why P extends only to certain contexts. And that means one would need to refer to a higher moral principle to justify the limited scope. That higher principle would be the ultimate moral principle. It must necessarily be universal in its scope; otherwise, a further regress would occur.

[80] *See supra* Part III.D.

[81] This sort of argument satisfies "formal rationality—that is, noncontradiction

"rational" or "coherent" theory of the law.

V. POSITIVISM AND THE LAW

The prior sections conclude that legal claims necessarily rest upon a single moral premise. That conclusion raises serious questions about the appeal of one of the most influential schools of jurisprudence today—positivism. At least traditionally, positivists have embraced what some have called the "separation thesis," the idea that law and morality have no necessary connection.[82] That conclusion no longer seems tenable, at least if one embraces the normative goal of jurisprudence. Before rejecting positivism, however, one must consider a possible argument why the theory remains relevant to the rationalizing effort.

The argument begins with the observation that jurisprudence has a limited scope. It is not concerned with the analysis of normative claims *in general*. Rather, jurisprudence focuses on normative claims about *the law*, such as claims about whether one should obey or disobey the law, how to interpret current law and how to apply the law. In this regard, any effort to rationalize legal claims must presuppose some concept of what it means to speak about the "law."

Here, the argument continues, is where positivism has something useful to say. For any attempt to distinguish normative claims about the law from other normative claims cannot turn simply on the normative nature of the claims. *All* of the claims are normative. Thus, to determine what makes a legal

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within a system of belief . . . . The Rawlsian conception of reflective equilibrium as a coherent scheme within which consistency is achieved among principles, and between principles and individual cases, is simply the expression of this drive in a particular philosophic idiom." GALSTON, *supra* note 57, at 28-29.

[82] Stanley L. Paulson, *On Transcendental Arguments, Their Recasting in Terms of Belief, and the Ensuing Transformation of Kelsen's Pure Theory of Law*, 75 NOTRE DAME L. REV. 1775, 1793 (2000) ("[Kelsen] like other legal positivists rejects the morality thesis of natural law theory, defending instead its contradictory, the separation thesis."); *see also* Marshall Cohen, *Preface* to RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 13, at ix ("A key feature of traditional positivism is its insistence on a conceptual separation of law and morals."); Ross, *supra* note 16, at 149-50 (stating that positivism rejects any necessary connection between normative claims and morality).

normative claim distinct—different from a non-legal normative claim—one needs to identify features that do not depend on the normative nature of the claims.[83] One needs, in short, a positivist description of the law.[84]

This argument preserves a role for positivism in defining the scope of the jurisprudential method. But it also reveals just how limited and uninspiring that role is. The positivist's project is important only if the ramifications of choosing one definition of law over another makes a significant difference to the normative goals of jurisprudence. That raises the question: Why do we want to distinguish between legal and non-legal claims?

No single answer presents itself. Individuals may have many different reasons for grouping social phenomena together under a common label.[85] Those reasons might differ depending on the individual's interests and situation.[86]

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[83] *See* Gavison, *supra* note 9, at 25 ("Usually, when people think of a theory of law, they think of an attempt to identify the features which are unique to law and distinguish it from other social phenomena.").

[84] This seems to be the point advanced by some theorists who suggest that a positivist definition of the law is necessary to identify the kinds of claims—the "pre-interpretive data"— that legal theorists should analyze. *See* HART, *supra* note 22, at 266 ("[T]he legal rules and practices which constitute the starting-points for the interpretive task of identifying the underlying or implicit legal principles constitute 'preinterpretive law', and . . . for its identification [a positivistic account of the law is needed]."); *see also* H.L.A. Hart, *Comment*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY, *supra* note 9, at 37 ("[T]he positivist's insistence that there is a task and need for a descriptive analytical jurisprudence is salutary even if it is regarded only as a preliminary to the articulation of a justificatory theory . . . ."); JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 200 (2001) ("Descriptive sociology enters not at the stage of providing the theory of the concept, but at the preliminary stage of providing the raw materials about which one is to theorize.").

[85] As H.L.A. Hart has said, to understand a classification, one needs to identify the "latent principle which guides our use of [the words]." SOPER, *supra* note 2, at 22 (quoting HART, *supra* note 22, at 14); Soper, *supra* note 14, at 1189-90 ("At issue in the case of definition is not what a person . . . thinks is important about law, but what such a person thinks is important in classifying something as law.").

[86] Different societies might have different needs for assigning labels to phenomena. Thus, in western cultures, a single word for "snow" is sufficient. Eskimos, however, have many different terms for snow, because different kinds of snow are used for different purposes. SOPER, *supra* note 2, at 3. Soper says that the same considerations explain why we have "separate concepts for chair and couch . . . rather than a single concept of furniture that can be variously described in terms of length, shape, size and so on." SOPER, *supra* note 2, at 22. As

For example, in assigning the label "law" to certain phenomena, one might be interested in highlighting the fact that certain kinds of claims have a significant impact on social life. These are rules of broad application, promulgated by institutions with the power to enforce those rules through coercive sanctions. Given the significant impact of these rules, one might think it particularly important to assess whether these rules are justified and to establish a separate discipline, jurisprudence, dedicated to that effort. The term "law," in this regard, might be used as a short-hand way of identifying highly significant normative rules—rules that are promulgated by institutions that have the power to enforce the rules through highly coercive sanctions.

Another reason to distinguish between law and non-law might also be identified. One might be interested in highlighting, not the impact of the normative claims, but the complexity of any effort to analyze the claim. Certain normative claims, for example, are promulgated by institutions that typically employ special rulemaking procedures and are part of an organized governing system. As a result, efforts to understand the scope and limitations of these rules may require technical knowledge of the institution's design. In addition, efforts to reconstruct the rules may require an understanding of how the rulemaking body interacts with other entities in the institutional structure.[87] Given the special knowledge and experience needed to understand and analyze these claims, one might conclude that it is useful to assign the label "law" to these claims and to establish a separate discipline, called "jurisprudence," to analyze them. Under this approach, the term "law" refers to a normative rule promulgated by an institution operating within a complex organized social system.

As these examples illustrate, the scope of the term "law"

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he observes: "One possibility is that we encounter the need for an object on which to recline as well as sit often enough to justify a separate concept for things that serve the purpose, saving us the need to repeat the more cumbersome description each time." *Id.*

[87] Some of the complexities that arise in reconstructing the Supreme Court's privacy decisions are discussed in Rappaport, *supra* note 28 (identifying moral, political, institutional and pragmatic principles underlying privacy doctrine).

differs somewhat depending on the point and purpose of using the label. Examining why different individuals use the label "law" is interesting, for it helps us understand the different reasons why individuals deem certain kinds of normative claims significant in common ways. Nonetheless, little of theoretical interest turns on whether one adopts one definition of the law or another. Indeed, given the multiple rationales that might exist, no single definition can be deemed the "correct" one. As a result, the debate over the "nature" of law is ultimately inconclusive, for it depends on the context within which the label is used.[88]

Moreover, if the ultimate goal is to analyze normative claims that interest us, we should not be distracted from that objective by disputes over whether the claim deserves the label "law" or not. The ultimate goal is to help individuals reflect on normative claims that interest them; in this light, little practical significance turns on whether other citizens apply the label "law" to that normative claim.

For example, suppose an individual is interested in assessing whether the international norm against genocide should be embraced. Suppose further that this international norm lacks an enforcement mechanism. If we define "law" to apply only to norms backed by coercive sanctions, then this international norm is not technically "law." But so what? If we are interested in assessing whether the norm is justified, we can proceed to analyze it by exploring the premises needed to justify the norm.

To recap, we have suggested that the province of jurisprudence is limited to analyzing certain kinds of normative claims—legal claims. In distinguishing legal claims from other claims, we have no choice but to adopt a positivist definition of the law. That definition might have some use—as a shorthand way of identifying claims that share common features and characteristics. At the same time, our discussion highlights why we should not worry ourselves too much if the boundaries of that label (and hence the scope of jurisprudence) are a bit blurry. The ultimate objective of jurisprudence is to evaluate normative claims that interest us in order to make a more reflective judgment about their appeal. As a result, even if a rule does not technically fall within the definition of "law," nothing prevents us from proceeding to analyze the claim anyway.

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[88] Discussions about the "nature" of law are sometimes subsumed under the label "conceptual analysis." The discussion here does not do full justice to the complexities of that subject. I intend to examine the methodology of conceptual analysis, and contrast that approach with rational reconstruction, in a subsequent paper.

VI. LAW'S OBLIGATIONS

The previous sections have outlined the basic features of rational reconstruction, clarified the nature of the moral premises that lie implicit in the rationalizing effort and highlighted the relevance of the methodology to the field of jurisprudence. This Part illustrates the methodology's operation, by applying it to a core jurisprudential issue. Specifically, this section addressees the question: Does a citizen have an independent obligation to obey the law?[89]

The question itself needs some clarification. First, the central issue we are interested in exploring is whether an *independent* obligation to obey the law exists— an obligation that is unrelated to the specific content of a law itself. As M.B.E. Smith points out, we all believe that citizens have a duty to refrain from murder, but that is because we believe that murder itself is wrong.[90] The question we want to address here is whether an individual has an additional duty to obey the law *simply because it is law*.[91]

Second, those who claim that an independent obligation to obey the law exists do not claim that the obligation is absolute.

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[89] In other papers, I have used the methodology to explain the premises of judicial review, the Court's core privacy doctrine, and the implicit premises of the U.S. Sentencing Guidelines. *See* Rappaport, *supra* note 28 (analyzing privacy and judicial review); Rappaport, *supra* note 29 (analyzing federal sentencing rules).

[90] *See* M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, *in* THE DUTY TO OBEY THE LAW 75, 76-77 (William A. Edmundson ed., 1999).

[91] *See* William A. Edmundson, *Introduction* to THE DUTY TO OBEY THE LAW, *supra* note 90, at 4 ("It is the existence of a general, 'gap filling' duty to obey the law that is in dispute."); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 3 (1985) ("[T]he issue is whether the legal prohibition adds to the moral reasons why one should not perform the act.").

Most argue that the obligation has some force, but can be overcome by countervailing moral considerations. That is, in some cases, civil disobedience may be appropriate to avert grave injustice. To suggest that law's obligation has weight, but is not dispositive, commentators frequently speak of a *prima facie* obligation to obey the law.[92]

The question, therefore, is whether an *independent, prima facie* obligation to obey the law exists. The goal here is not to offer a comprehensive review of scholarly writing on the subject—the issue has been the subject of extensive debate. Rather, my intention is simply to demonstrate some of the ways that the process of rational reconstruction frames the analysis and provides a novel look at an age old puzzle.

A. Deontological Justifications for Obeying the Law

As we have seen, all normative claims rest on moral premises, and the claim that citizens have an obligation to obey the law is no exception.[93] But which moral principle can support the belief that citizens have an obligation to obey the law?

Most efforts to justify this claim have relied on deontological moral principles.[94] H.L.A. Hart, for example, has advanced such a principle, which he calls the "duty of fair play." Hart argues that, "when a number of persons conduct *any joint enterprise* according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission."[95] The duty of fair play resembles a kind of social contract argument. As Raz observes, the "main thrust of the principle is that those who benefit from the cooperative efforts of others have an obligation to cooperate as well."[96]

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[92] *See* Smith, *supra* note 90, at 76.

[93] Claims about the obligation to obey the law require some understanding of what is meant by the concept "law." However, commentators rarely, if ever, clarify what they mean by the term. For purposes of this section, I ignore this underlying concern and address the commentators' moral arguments on their own terms.

[94] The principles discussed in this section are widely viewed as deontological principles; they seek to justify a citizen's obligation to obey the law in terms of the inherent rightness of doing so, rather than in terms of the consequences of obedience. *See* Greenawalt, *supra* note 91, at 4 ("Natural duties have been understood as something more than a general moral injunction to promote desirable consequences."); Joseph Raz, *The Obligation to Obey: Revision and Tradition*, *in* THE DUTY TO OBEY THE LAW, *supra* note 90, at 171-72 ("Non-instrumental reasoning is central to a distinguished tradition in political philosophy. Today one of the most common arguments [for the obligation to obey the law] . . . is based on alleged considerations of fairness."). Consequentialist arguments in support of an obligation to obey the law are discussed, *infra*, Part VI.B.

John Rawls has offered a different deontological principle in support of an obligation to obey the law, which he calls a "natural duty of justice." According to that principle, every citizen has an inherent duty to comply with the rules of a just society.[97] For Rawls, society need not be perfectly just to generate obligations of obedience. Rather, citizens have an obligation to comply with the rules—even unjust rules—of any *reasonably* just society.[98]

Commentators have criticized both deontological principles, on the grounds that they conflict with basic intuitions about the law's binding force. For example, the duty of fair play suggests that an individual who *involuntarily* receives benefits from the government (or from other individuals) has an obligation to contribute to a cooperative enterprise. This might seem odd. As Simmons writes, it "would be peculiar if a man, who by simply going about his business in a normal fashion benefited unavoidably from some cooperative scheme, were told that he had voluntarily accepted benefits which generated for him a special obligation to do his part."[99] The natural duty of justice generates its own anomalies. For example, that duty implies that a citizen has a duty to obey a law even when failure to comply would generate no negative consequences.[100] Indeed, the natural duty of justice implies that a citizen would have a duty to obey an *unjust* law, even if disobeying that law might lead to its reform and the creation of a more just society.

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[95] H.L.A. Hart, *Are There any Natural Rights?,* 64 PHIL. REV. 175, 185 (1955) (emphasis added). Hart continues:

> The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is *due to* the co-operating members of the society, and they have the correlative moral right to obedience.

Id.; *see also* A. John Simmons, *The Principle of Fair Play, in* THE DUTY TO OBEY THE LAW, *supra* note 90, at 109 (discussing Hart's views).

[96] George Klosko, *Presumptive Benefit, Fairness, and Political Obligation, in* THE DUTY TO OBEY THE LAW, *supra* note 90, at 194; *see* RAWLS, *supra* note 33, at 112 ("We are not to gain from the cooperative labors of others without doing our fair share."); Smith, *supra* note 90, at 78 ("[I]t is often claimed that, when a person accepts benefits from another, he thereby incurs a debt of gratitude towards his benefactor.").

[97] *See* Smith, *supra* note 90, at 83; *see also* Greenawalt, *supra* note 91, at 47 ("If one's society has a constitutional order that is as just as one could hope for in that society, then a duty to support just institutions should reach compliance with its laws.").

[98] *See* Greenawalt, *supra* note 91, at 38 ("Rawls's natural duty to comply with just institutions concerns only nearly just constitutional orders, but reaches unjust laws within these orders.").

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[99] *See* Klosko, *supra* note 96, at 198 (quoting A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 131 (1979)); *see also* Smith, *supra* note 90, at 78 ("Ordinarily, if someone confers benefits on me without any consideration of whether I want them . . . I have no obligation to be grateful towards him."). Raz agrees, concluding that the duty of fair play, "is of dubious validity when one has no choice but to accept the benefits, or even more generally, when the benefits are given to one who doesn't request them." Raz, *supra* note 94, at 172.

Advocates of the duty of fair play have sought to respond to the criticism. For example, commentators like Rawls argue that an obligation to comply with a cooperative system exists only when an individual "accepts" the benefits in a voluntary and active way. *See* RAWLS, *supra* note 33, at 111-12 (stating that no obligation exists unless one has "voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests"); Simmons, *supra* note 95, at 126 ("For Rawls and Hart, the principle of fair play accounts for the obligations of those whose active role in the scheme consists of accepting the benefits of its workings."); *see also* Klosko, *supra* note 96, at 199 ("In most cases this can be explicated as voluntary pursuit of given benefits."); A. John Simmons, *The Principle of Fair Play*, 8 PHIL. & PUB. AFF. 307, 327 (1979) (defining acceptance).

The difficulty with this solution is that few citizens seem to have "accepted" the benefits of living in organized society in this way. Thus, as Simmons says, "a theorist who holds that the acceptance of benefits from a cooperative scheme is the *only* ground of political obligation will be forced to admit that in at least a large number of nations, *no* citizens have political obligations." *See* Simmons, *supra* note 95, at 135; *see also* Smith, *supra* note 90, at 83 (noting that "Rawls has abandoned the argument from fair play [which] . . . excludes the bulk of the citizenry . . . on the ground that, for most persons, receiving benefits from government is nothing they do voluntarily, but is rather something that merely happens to them").

[100] Greenawalt affirms that, "given the many trivial, foolish, and overbroad laws and the many circumstances in which disobedience, even if widespread, will not undermine the serious aims behind laws, a natural duty to obey does not apply on every occasion of application of just laws." *See* Greenawalt, *supra* note 91, at 44; *see also* Smith, *supra* note 90, at 82-83 ("[V]irtually every legal system contains a number of pointless or even positively harmful laws, obedience to which either benefits no one or, worse still, causes harm.").

This criticism is powerful, and it raises serious questions about the intuitive appeal of the deontological principles. But since these considerations have been discussed in depth by others, we will not belabor that criticism here. Rather, our focus will be on assessing whether these deontological principles can offer a plausible reconstruction of certain basic intuitions about civil disobedience.

As noted, the obligation to obey the law is not absolute. Under certain circumstances, a citizen will have an obligation to *disobey* the law. Such an obligation may exist even in a reasonably just society and even in a society where citizens benefit from living in a cooperative social system. Neither the duty of fair play or natural justice offers a plausible basis for *disobeying* the law. How, then, can deontological theorists account for civil disobedience?

One possible answer is that deontological principles do not exhaust the moral considerations at play. Thus, one might assume the existence of separate moral principles that sometimes militate for noncompliance with the law. Where such moral considerations exist, an individual is subject to conflicting obligations. Deontological principles of fair play and natural justice support the obligation to obey the law, while other moral principles support an obligation to disobey the law.[101] Civil disobedience is appropriate whenever the obligation to disobey the law exceeds the obligation to obey.[102]

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[101] Rawls himself acknowledges such a possibility in his earlier writings, although he suggests that only another deontological principle can override the natural duty of justice. *See* John Rawls, *Legal Obligation and the Duty of Fair Play*, *in* LAW AND PHILOSOPHY 13 (Sidney Hook ed., 1964) ("[O]ur obligation to obey the law, which is a special case of the principle of fair play, cannot be overridden by an appeal to utility, though it may be overridden by another duty of justice.").

[102] This balancing approach also seems to account well for the common-sense view that civil disobedience should only occur in exceptional cases, where moral considerations are sufficiently powerful to override the duty of obedience. *See* Greenawalt, *supra* note 91, at 58 ("My own conclusion is that no simple principle exists for ordering justice and utility . . . . About the most that can confidently be said is that if a negative duty [to obey the law] is present, consequential rea-

This superficially appealing explanation, however, will not do. We have already seen that hybrid moral theories—which seek to integrate multiple moral principles into a single theory—cannot offer a coherent justification for normative claims. In order to reconcile the conflicting values in a justified manner, we must again assume the existence of a higher moral principle that can arbitrate the dispute. That higher principle is the ultimate source of value, for it dictates when a citizen has an obligation to obey the law and when she does not.

What might be immediately obvious is that neither the duty of fair play or natural justice can serve as this ultimate principle, since neither is capable of explaining why a citizen might have a basis for disobeying the law. Thus, if we believe that the obligation to obey the law is only a prima facie obligation, we must believe that some *other* principle exists to reconcile the conflicting norms, a principle that tells us when to obey the law and when to disobey. We must reject the idea, in other words, that a deontological principle (whether from natural justice or fair play) represents the "ultimate" moral principle. At best, the duty to obey the law must serve some higher purpose. It must be justified, if at all, on consequentialist grounds.

B. *Consequentialist Arguments for Duty to Obey*

The consequentialist justification for obeying the law is relatively straightforward. After all, obeying the law can generate a number of positive effects. We might have pragmatic reasons for obeying the law. We might think, for example, that disobedience will lead to disrespect for the governing institutions, which can breed general disorder and insecurity.[103] We

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sons to the contrary can override its power only if they are substantial . . . ."); *see id.* at 62 ("I have considered and rejected the possibility that clear priorities can be established between the duty and competing moral considerations.").

[103] Smith, *supra* note 90, at 89 ("[G]overnment is absolutely necessary for securing the general good: The alternative is the state of nature in which everyone is miserable . . . . But, no government can long stand in the face of wide-spread disobedience, and government can therefore promote the general good only so long as its laws are obeyed."); *see also* Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 7 (1990) (noting that disobedience "may encourage others to disobey law in situations where it would be morally undesirable for that to happen").

might have institutional reasons to obey. We might believe, for example, that government has an institutional advantage in determining how to promote human welfare, that obedience will lead to better decisionmaking over the long run.[104] We might have personal reasons to obey the law. We might fear, for example, that disobedience will lead to government sanctions.[105]

A consequentialist, in short, will often have good reasons for encouraging citizens to obey the law. Nonetheless, for the consequentialist, the duty to obey the law will differ significantly from the duty portrayed by the deontological principles. Notably, under a consequentialist theory, a citizen's duty to obey the law will vary from case to case. Where the negative consequences of disobedience are negligible, a citizen will not be obligated to obey the law.[106]

In this regard, consequentialism does not offer an argument for an independent obligation to obey the law *in every case*. Rather, to assess whether an obligation exists, one must undertake an individualized assessment of the good and bad consequences of violating the law. As M.E.B. Smith says, "once we abandon the notion that civil disobedience is morally significant per se, we shall judge it in the same way we judge most other kinds of acts, that is, on the basis of their character and consequences."[107]

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[104] Larry Alexander makes this point, when he writes:

> If because of its design the legislature is likely to know much more than I about what is a safe speed at which to drive, which household products will pollute the environment, and so forth, then when it enacts [a law pertaining to these subjects], I may have reason to disbelieve what I had previously . . . believed . . . . In other words, the decisions of legal authorities in a well-designed legal system can affect people's *epistemic reasons*, their reasons for believing certain acts are desirable or undesirable.

Alexander, *supra* note 103, at 8.

[105] *Id.* at 7-8 (noting that law may affect decisions whether to obey law, if disobedience "may result in my suffering a sanction, and that fact may carry sufficient normative weight to tip the balance" against disobeying).

[106] We can easily imagine situations where the harmful consequences of disobeying the law are minimal. A driver facing a thirty mile-per-hour speed limit on a desolate stretch of road at 4 a.m. may conclude—we can assume quite accurately—that few negative consequences will occur from his driving faster. His act will likely go undetected, the violation is not likely to breed disrespect for the law and the government probably does not have an institutional advantage over him in assessing the danger of driving faster at this time. *See* Smith, *supra* note 90, at 84.

Rational reconstruction, in sum, poses a challenge to Rawls and Hart and anyone else who believes that citizens have a non-consequentialist duty to obey the law. Those who continue to believe that such an obligation exists must explain how deontological justifications can justify a *prima facie* duty of obedience. By highlighting inconsistencies in those arguments the methodology encourages further reflection on the premises of belief. That, in the end, is the overarching goal of the rationalizing methodology.

VII. HANS KELSEN'S PURE THEORY OF LAW

The Article's goal thus far has been constructive—to identify a plausible objective for legal theory and to outline a methodology that serves that objective. At the same time, the analysis provides a basis to assess the methods adopted by other legal theorists. To that end, this Part will contrast the rationalizing methodology with the approach taken by Hans Kelsen, one of the most influential legal theorists of the twentieth century.[108] Ronald Dworkin's interpretive theory is addressed in the next Part.

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[107] Smith, *supra* note 90, at 95. Although their reasons differ, an increasing number of philosophers today tend to agree with this conclusion. *See* Leslie Green, *Who Believes in Political Obligation?*, *in* THE DUTY TO OBEY THE LAW, *supra* note 90, at 301 (noting "coalescence of opinion" against idea that independent obligation exists to obey the law); Robert P. Lawry, *Ethics in the Shadow of the Law: The Political Obligation of a Citizen*, 52 CASE W. RES. L. REV. 655, 656 (2002).

> For a long time in the West, there was a consensus that the existence of a law entailed a prima facie obligation to obey it. . . . Over the past three decades, that consensus has been attacked in a series of articles by prominent philosophers, who find no basic obligation to obey the law at all.

Id.

[108] Jeffrey Brand-Ballard, *Kelsen's Unstable Alternative to Natural Law: Recent Critiques*, 41 AM. J. JURIS. 133, 133 (1996) (noting that the international community treats Kelsen as a central figure in legal theory, though "the seminal nature of his work remains underappreciated in the United States"); Robert P. George, *Kelsen and Aquinas on "The Natural-Law Doctrine,"* 75 NOTRE DAME L. REV. 1625, 1625 (2000) (referring to Kelsen as "the leading European legal theo-

A. *Kelsen's "Regressive" Approach*

Kelsen's complex and often obscure writings are notoriously difficult to decipher; nonetheless, several core theses can be identified.[109] One central element is his "regressive" methodology, which resembles the methodology of rational reconstruction.[110] Like rational reconstruction, the regressive approach is concerned with the "normativity" of the laws—the sense that legal claims represent "should" statements that impose "obligations" on citizens.[111] Like the rationalizing methodology, Kelsen is not interested in demonstrating that legal claims are

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rist of the twentieth century"); H.L.A. Hart, *Kelsen Visited*, 10 UCLA L. REV. 709, 728 (1963) (describing Kelsen as "the most stimulating writer on analytical jurisprudence of our day"); Roscoe Pound, *Law and the Science of Law in Recent Theories*, 43 YALE L.J. 525, 532 (1933-34) ("[Kelsen is] unquestionably the leading jurist of the time.") (quoted in Stanley L. Paulson, *Introduction* to HANS KELSEN, AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, at xvii (Oxford Univ. Press 1992) (1934))).

[109] Kelsen's theory has been widely criticized for its obscurities. *See* Joseph Raz, *The Purity of the Pure Theory*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 237 ("Some commentators have expressed exasperation in the face of what they regard as Kelsen's obscurities and have dismissed some of his central doctrines as confused. I myself have not escaped the occasional feeling of despair in struggling to fathom the meaning of some of his theses."); *see also* LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* note 12, at 271 (suggesting that the controversy over Kelsen's writings "has partly been due to . . . the use of language which, to Anglo-Saxons at least, is apt to prove deceptive").

[110] *See* Stanley L. Paulson, *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, 12 OXFORD J. LEGAL STUD. 311, 329 (1992) (discussing Kelsen's "regressive" approach).

[111] *See* Carlos Santiago Nino, *Some Confusions Surrounding Kelsen's Concept of Validity*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 253 (observing that Kelsen is interested in the "binding force" of law); Deryck Beyleveld & Roger Brownsword, *Methodological Syncretism in Kelsen's Pure Theory of Law*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 117 ("A normative interpretation attaches a value ('good' or 'bad,' 'it ought' or 'it ought not' to be done) to an object or behaviour."). Similarly, Kelsen emphasizes that he is not interested simply in empirical questions about the law. Thus, he explains that he is not interested in the causative factors that lead certain laws to be enacted. That effort, he suggests is the focus of sociology, not legal theory. *See* HANS KELSEN, PURE THEORY OF LAW 101-02 (Max Knight trans., Univ. of Cal. Press 1967) (2d ed. 1960); HANS KELSEN, *The Pure Theory of Law and Analytical Jurisprudence*, *in* WHAT IS JUSTICE? 269 (1957).

in fact obligatory. Kelsen's interest lies in exploring the underlying assumptions that must hold true if the law has normative force.[112] In other words, like rational reconstruction, Kelsen adopts an internal perspective on the law's claims.

Many of the details of Kelsen's approach will be familiar. Kelsen observes that "should" statements, which he calls *norms,*[113] cannot rest solely on empirical assumptions. Rather, Kelsen says, a "should" statement must be premised upon another "higher" norm, which in turn might be justified in terms of even higher norms.[114] Thus, the process leads to a kind of regress, in which deeper and deeper principles of justification are uncovered.

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[112] *See* Gerhard Luf, *On the Transcendental Import of Kelsen's Basic Norm*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 224 (contending that Kelsen attempts to "demonstrate structurally whatever . . . must be presupposed when one takes up the law from the standpoint of legal science").

[113] In this sense, norms are claims about how citizens "should" behave. KELSEN, PURE THEORY OF LAW, *supra* note 111, at 4 ("By 'norm' we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way."); *id.* at 5 ("[T]he norm is an *ought* . . . . "); KELSEN, *The Pure Theory of Law and Analytical Jurisprudence*, *supra* note 111, at 267 ("The regulation [created by laws] is accomplished by provisions which set forth how men ought to behave. Such provisions are called norms . . . ."); *see also* HANS KELSEN, *Value Judgment in the Science of Law*, *in* WHAT IS JUSTICE?, *supra* note 111, at 215; Honoré, *supra* note 58, at 90 ("Norms prescribe how people ought to behave."); Joseph G. Starke, *Monism and Dualism in the Theory of International Law*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 537 ("A norm is in short a prescription enjoining a defined mode of action.").

In this regard, the "category of [legal] norms" is a "category designated by 'ought.'" KELSEN, *supra* note 108, at 26; *see also* KELSEN, PURE THEORY OF LAW, *supra* note 111, at 4 ("The legal order . . . is a normative order of human behavior—a system of norms regulating human behavior.").

[114] KELSEN, PURE THEORY OF LAW, *supra* note 111, at 195 ("The norm which represents the reason for the validity of another norm is called . . . the 'higher' norm."); *id.* at 193.

> [W]hy an individual ought to behave in a certain way, cannot be answered by ascertaining a fact, that is, by a statement that something *is* . . . . From the circumstance that something *is* cannot follow that something *ought* to be; and that something *ought* to be, cannot be the reason that something *is*. The reason for the validity of a norm can only be the validity of another norm.

Id.; *see also* KELSEN, *Value Judgments in the Science of Law*, *supra* note 113, at 219 ("If we ask why a certain legal norm is valid, the answer is always in terms of another (higher) norm which regulates the creation of the former (lower) norm . . . . ").

Kelsen recognizes that this process must ultimately come to an end. "It must end with a norm which, as the last and highest, is presupposed. . . . This final norm's validity cannot be derived from a higher norm, the reason for its validity cannot be questioned."[115] Kelsen refers to this final norm as the "basic norm" (or *grundnorm* in German).[116] As he says, "The basic norm is the common source for the validity of all norms that belong to the same order—it is their common reason of validity."[117] Like rational reconstruction, therefore, Kelsen concludes that all normative claims about the law must rest at bottom on an obligation-producing principle, the "basic norm."

The resemblances to rational reconstruction do not end here. Kelsen concludes that the basic norm must be a unitary principle. A multiplicity of basic norms cannot exist, Kelsen writes, because they might conflict when applied to specific cases. That would be unacceptable, Kelsen says, for "the cognition of the law, like any cognition, seeks to understand its subject as a meaningful whole and to describe it in noncontradictory statements."[118] Kelsen thus adopts something very much like the requirement of horizontal consistency. He contends that a single principle must lie at the foundation of the legal system, a principle that infuses the law with normative force.

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[115] KELSEN, PURE THEORY OF LAW, *supra* note 111, at 194-95; *see* KELSEN, *Value Judgments in the Science of Law*, *supra* note 113, at 219 ("The series of reasons for the validity of a norm is not infinite like the series of the causes of an effect. There must exist one ultimate reason, one basic norm, which is the source of the validity of all norms belonging to a certain legal order."); *see also* Eugenio Bulygin, *An Antinomy in Kelsen's Pure Theory of Law*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 313-14 ("The basic norm is neither a self-evident norm nor does it justify any legal order, for it is merely presupposed to be valid, but is not really binding . . . . It is because the basic norm is a mere hypothesis of legal science that its acceptance does not commit jurists to a certain moral or political position . . . ."); M.P. Golding, *Kelsen and the Concept of a "Legal System," in* MORE ESSAYS IN LEGAL PHILOSOPHY 64, 76 (Robert S. Summers ed., 1971) ("Ultimately the chain of justifications *must* reach a final link, the *Grundnorm*, which serves the function of the *Unpositive Mover* of a system of positive law.").

[116] KELSEN, PURE THEORY OF LAW, *supra* note 111, at 195 (noting that the "highest norm is referred to in this book as basic norm").

[117] *Id.*; *see also* KELSEN, *Value Judgments in the Science of Law*, *supra* note 113, at 219. An individual can reject the basic norm's validity, but doing so would raise questions about the validity of the entire legal system. *See* KELSEN, PURE THEORY OF LAW, *supra* note 111, at 68 ("True, legal norms, as prescriptions of what ought to be, constitute values; yet the function of the science of law is not the evaluation of its subject but its value-free description. The legal scientist does not identify himself with any value, not even with the legal value he describes."); KELSEN, *Value Judgments in the Science of Law*, *supra* note 113, at 226-27 (discussing the case of an anarchist who believes that the norm is simply a false ideology used to rationalize the law); *see also* Raz, *supra* note 109, at 246 (noting that Kelsen's analysis does not commit anyone to believe that the legal system really is normative and binding).

B. The Purity of the Pure Theory

The similarities between Kelsen's approach and rational reconstruction are, at first glance, rather dramatic.[119] Even so, it would be a mistake to view the methodologies as identical. Kelsen's legal theory differs in several respects from the rationalizing approach discussed in the first half of the Article. Some of those departures are, on reflection, insubstantial. But some raise serious questions about the ultimate purpose and coherence of his analysis.

One obvious difference between the two approaches is the way the methods characterize the obligation-producing principle that lies at the foundation of the normative claims. We have characterized that principle as moral in nature. Kelsen, by contrast, rejects the idea that the basic norm is a moral principle. Indeed, he affirms that the central purpose of his theory is to explain law's normativity *without* relying on morality. This is, in large part, what Kelsen means when he says he is concerned with identifying a "pure theory" of the law—a theory of the law that is purified of moral philosophy (as well as other non-legal disciplines, such as sociology).[120]

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[118] KELSEN, PURE THEORY OF LAW, *supra* note 111, at 206; *id.* at 208 ("[T]he basic norm makes it possible to interpret the material submitted to legal cognition as a meaningful whole, which means, to describe it in logically noncontradictory sentences."); *see also* H.L.A. Hart, *Kelsen's Doctrine of the Unity of Law*, *in* NORMATIVITY AND NORMS, *supra* note 12, at 553 ("[Kelsen's] central positive contention is that all valid laws necessarily form a single system, and [his] central negative contention is that valid laws cannot conflict." (footnotes omitted)).

[119] A leading Kelsen commentator has even referred to Kelsen's approach as a "rational reconstruction" of the law. *See* Golding, *supra* note 115, at 71-72 ("One of the tasks which the logical positivists set for themselves is called *rational reconstruction* . . . . Briefly put, the logical positivists selected various branches of knowledge, . . . and attempted to reconstruct them on the basis of 'rational' principles."); *see id.* at 73 ("The underlying motif of Kelsen's 'pure theory of law' and the relation of his legal positivism to logical positivism is the application of the notion of rational reconstruction to legal systems, or normative orders.").

These differences in the characterization of the fundamental norm suggest that a real divide exists between Kelsen's methodology and rational reconstruction. But at least on this point, the divide is merely semantic. Kelsen never offers a clear definition of the term "morality," so it is difficult to know what he means by saying that the basic norm is not a moral norm. But we have offered a definition; moral principles, we said, are obligation-producing norms.[121] Kelsen's description of the basic norm fits that definition precisely.[122]

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[120] *See* KELSEN, *supra* note 108, at 7 ("[T]he Pure Theory aims to free legal science of all foreign elements."); KELSEN, *The Pure Theory of Law and Analytical Jurisprudence*, *supra* note 111, at 266 ("[T]he discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one hand, and from sociology . . . on the other."); Hans Kelsen, *The Pure Theory of Law*, 50 LAW Q. REV. 474, 477 (Charles H. Wilson trans., 1934) (affirming that his central concern is to purify legal theory—"to free the science of law from all foreign elements"); *see also* Ballard, *supra* note 108, at 143 ("[Kelsen argues for] the 'double purity' of law—the notion that the legal realm is separable from both the moral and the factual realms."); Beyleveld & Brownsword, *supra* note 111, at 114 ("The apparent paradox in Kelsen is that we have what may be construed as a thoroughly moral account of the concept of law . . . running alongside a textbook legal positivist account of legal validity . . . .").

In this regard, Kelsen can be viewed as trying to establish a middle-way between natural law and positivist theories of the law. Like natural lawyers, Kelsen is concerned with the binding force, the obligatoriness, of the law. But like the positivists he wants to explain this sense of obligation in a way that does not require reference to morality. Thus, Kelsen adopts the positivist's belief in the "separation" thesis—the idea that no necessary connection exists between law and morality. *See* Paulson, *supra* note 82, at 1793-94.

[121] *See supra* Part III.B.

[122] Kelsen recognizes that the basic norm and moral principles share a similar form; both offer an explanation for law's normativity. As Kelsen notes, the basic norm's approach and natural law's approach are similar in that:

> the validity of law . . . according to all . . . of them [is] a hypothetical basic norm. . . . The only difference is that the validity for which the basic norm of legal positivism furnishes the reason, is the inherent validity of a positive law, whereas the validity for which the basic norm of a natural-law doctrine . . . furnishes the reason, is the validity of a natural . . . order.

HANS KELSEN, *Why Should the Law Be Obeyed?*, *in* WHAT IS JUSTICE?, *supra* note

Thus, Kelsen may claim that his theory is pure, but given the definition adopted in this paper, it is hard to see how that is so.[123] To put the point another way, both Kelsen's methodology and rational reconstruction assume the existence of an obligation-producing norm at the heart of the legal system. That is the important point. Whether that principle is called a "moral" principle or simply the "basic norm" does not represent a substantive difference between the methodologies.

Nonetheless, real differences between the methods do exist. Those differences are not easily seen on a cursory examination of Kelsen's theory. As we will see, they emerge only upon closer examination of the role the basic norm plays in Kelsen's theory and particularly its role in explaining the normative force of the law.

C. *The Odd Pedigree of the Pure Theory*

Kelsen describes the link between the basic norm and law's normativity in a remarkable passage in his major work, *Pure Theory of Law*.[124] In that passage, Kelsen attempts to trace law's normativity to its core premises. In doing so, Kelsen adopts a kind of institutional delegation analysis. He observes that a given law's validity depends on the authority of the institution—typically, the legislature—that enacts it. The legislature's authority, in turn, can be traced to the adoption of a constitution. He continues:

> If we ask for the reason of the validity of the constitution . . . we may, perhaps, discover an older constitution; . . . the existing constitution is justified by the fact that it was created according to the rules of an earlier constitution by way of a

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111, at 263.

[123] Other commentators have made similar points—observing that Kelsen cannot help but rely on moral claims if he is to explain the "normativity" of the law. *See, e.g.*, Raz, *supra* note 109, at 245 ("If legal statements are as normative as ordinary moral ones, if they are moral statements, then the law and its existence and content, which is what legal statements state, seem to be essentially moral facts."); Ross, *supra* note 16, at 160 ("[T]he idea of a duty to obey the law (to fulfill legal obligations) only makes sense on the supposition that the duty spoken of is a true moral duty corresponding to the 'binding force' inherent in the law.").

[124] KELSEN, PURE THEORY OF LAW, *supra* note 111.

> constitutional amendment. In this way we eventually arrive at a historically first constitution . . . whose validity . . . cannot be traced back to a positive norm created by a legal authority . . . .[125]

The historically first constitution, in this sense, is the final source of authority for the institutions in the legal system. That constitution delegates authority to subsequent constitutions, which in turn authorize enactments of current laws by rulemaking bodies.[126] This idea of tracing the authority of current laws to an originating event—the adoption of the "first constitution"—is sometimes referred to as Kelsen's "pedigree theory."[127]

It should be understood that the idea of the "first constitution" is not a metaphor for the moral principles that lie implicit in the legal system. Rather, the constitution represents an actual historical event, the written or unwritten rules of social organization adopted by the nation's founders expressly or through custom.[128] A moment's reflection may raise questions about how a *fact*—the adoption of a constitution—can generate obligations. That seems to violate the principle that a "should" statement cannot be derived from an "is," that normative claims cannot rest on empirical premises.

Kelsen, however, is aware of this potential criticism. He affirms that the historically first constitution is not the ultimate norm of the legal system, and that one can "ask for the reason of the validity of the historically first constitution."[129]

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[125] *Id.* at 200.

[126] *See* Honoré, *supra* note 58, at 100-01 (discussing Kelsen's concept of delegation of authority); *see also* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 116 (Anders Wedberg trans., 1945) ("The whole function of [the] basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act.").

[127] *See* Honoré, *supra* note 58, at 100-05.

[128] Kelsen frequently refers to the constitution as an actual historical event. *See, e.g.*, KELSEN, PURE THEORY OF LAW, *supra* note 111, at 201 ("[I]t must be kept in mind that [the basic norm] refers directly to a specific constitution, actually established by custom or statutory creation, by and large effective . . . ."); *id.* at 210 ("The basic norm refers only to a constitution which is actually established by legislative act or custom, and is effective.").

[129] *Id.* at 200-01.

The assumption that the constitution is binding, he affirms, is a "presupposition." Moreover, "[s]ince the reason for the validity of a norm can only be another norm, the presupposition must be a norm . . . . [I]t is the basic norm of a legal order [and can] be formulated as follows: . . . One ought to behave as the [historically first] constitution prescribes."[130] The basic norm, in other words, tells us that the constitution's commands are *obligatory*.

Here is where Kelsen's analysis founders; this description of the basic norm renders it incapable of explaining core intuitions citizens have about the law.[131] To take an obvious example, Kelsen's approach cannot explain why civil disobedience is ever justified; that is, why law sometimes lacks normative force. Under Kelsen's pedigree theory, the basic norm stands for the proposition that citizens should *always* obey the dictates of the constitution. Thus, Kelsen's theory suggests, implausibly, that we are obligated to obey even grossly unfair constitutional directives.[132]

These problems do not disappear if we limit our attention to reasonably just constitutional systems, such as our own. We can easily imagine cases where a "constitutionally authorized" rule in our society is so unfair that civil disobedience is obligatory. If that is so, then the basic norm's precept—"one *always* ought to behave as the constitution prescribes"—conflicts with common intuitions about the law's binding force.[133]

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[130] *Id.*; *see id.* at 204 ("One ought to obey the prescriptions of the historically first constitution."); KELSEN, *supra* note 122, at 262 ("We ought to obey the decisions of a judge or administrator, ultimately, because we ought to obey the constitution. . . . To the question why we . . . can only answer: the norm that we ought to obey the provisions of the historically first constitution must be presupposed as a hypothesis if the coercive order established on its basis . . . is to be considered as a valid order binding upon these individuals . . . . This is the basic norm of a positive legal order, the ultimate reason for its validity . . . .").

[131] For a similar conclusion, relying upon a somewhat different analysis, see Honoré, *supra* note 58, at 102 ("It is generally agreed that Kelsen's pedigree theory, with its reliance on the validity of the original constitution, is unsuccessful.").

[132] One might respond that the basic norm should be understood in a more limited sense—as a claim that the obligation to obey the Constitution arises only where the Constitution is adopted through fair procedures. But this will not do either. Few (if any) constitutions have been adopted through fair procedures. *See* Honoré, *supra* note 58, at 102 ("[T]he original constitution of virtually every country was invalid. It was made by people who were not entitled to rule. . . . It is only if Might [makes] Right that it can appear plausible . . . ."). The American Constitution, for example, was adopted through a procedure that excluded the great majority of adults, including all blacks and women.

A further problem is that the basic norm fails to offer a way to justify decisions interpreting the constitution's meaning. Kelsen seems to assume that the historically first constitution has an easily identified and determinate meaning. But that assumption is wildly implausible. After all, any effort to interpret the meaning of the constitution requires an interpretive method. Should we look to the original intent, textual analysis, tradition, or some other factor? As noted earlier, the answer to that question cannot be found in the constitution itself, since any attempt to read the constitution presupposes an interpretive method.

The implication is that any claim that we "should" interpret the constitution in a certain manner must itself rely upon a deeper moral principle, a principle that generates obligations of obedience. And that moral principle must transcend the text of the constitution itself and provide a justification for choosing a specific interpretive method. Kelsen is unable to account for this deeper moral norm. He simply affirms that citizens should obey the constitution, without explaining how citizens can identify what the constitution justifiably means.[134]

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[133] The obligation to obey the Constitution's commands is, at best, prima facie. The obligation can be overcome by sufficiently strong countervailing moral considerations. The implication is that Kelsen's basic norm is not the ultimate source of normativity in the legal system. A higher principle must exist to dictate when an individual is obligated to obey the constitutionally authorized rule and when he is not. That higher principle, not the *grundnorm*, is the ultimate principle in society; it determines the bindingness of constitutionally-enacted rules.

This conclusion cannot be avoided by positing the existence of two conflicting principles: One principle (the basic norm) instructs us to obey the first constitution; a second principle tells us to disobey the constitution when morality demands it. We saw in the discussion of civil disobedience that this sort of hybrid approach is unstable. If we believe we can resolve this conflict of obligations in a determinate manner, we must believe that a higher principle exists that dictates when to obey the law and when to disobey. That higher principle—not the basic norm—is the ultimate source of value.

[134] An obvious illustration of the Constitution's indeterminacy is provided by the Supreme Court's privacy jurisprudence. Suppose we wanted to rationally reconstruct the major decisions in that field. *See generally* Rappaport, *supra* note 28

D. The Purpose of the Pure Theory

Jurisprudence, we have said, should seek to identify the premises of legal claims so individuals can consider those claims in a more reflective manner. Kelsen's theory fails to advance that objective. Given his description of the basic norm, he is unable to provide a coherent justification for common intuitions about the law, about constitutional interpretation and about civil disobedience.

It is conceivable, of course, that Kelsen's theory is designed to serve a different purpose than the normative goal we have identified. But, if so, Kelsen does not identify what that alternative purpose might be. On occasion Kelsen suggests that his

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(reconstructing Supreme Court's major privacy decisions). Attempts to justify the decisions cannot rely simply on the language of the Due Process Clause or the "penumbras" of the Bill of Rights. After all, the Due Process Clause or the penumbras of the Constitution do not clearly say why certain privacy decisions (such as a right to contraception) are affirmed, but others are not (such as a right to assisted suicide). And the original intent of the drafters is no more helpful. *See* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1064 (1981) ("The judges and scholars who support judicial intervention usually acknowledge that the rights at stake—variously described in terms of privacy, procreational choice, sexual autonomy, lifestyle choices, and intimate association—are not specified by the text or original history of the Constitution.").

A more promising tact is to identify "unwritten" principles that give meaning to the constitutional text. For example, we might say that, in drafting the Constitution, the founding fathers expressed an appreciation for promoting both individual liberty and traditional values, principles that are both expressed in the Court's privacy cases. This approach is on the right track, but incomplete. Principles such as liberty can be interpreted in many different ways and at many different levels of generality. That means that, if we are to explain why specific judicial decisions are justified, we must take a stand on the specific meaning of these deeper, more abstract principles that underlie the Constitution.

That will often be challenging because the principles we identify, such as the principles of liberty and tradition, will sometimes conflict. As a result, if we believe these conflicts can be resolved in a justified manner, we must posit the existence of higher principles of justification. In this way, as we seek to reconcile the norms that give meaning to the constitutional text, we find ourselves again constructing a hierarchal system of norms. If the argument in support of the legal decisions is internally consistent, the system of norms will ultimately converge on a single obligation-producing principle. That principle, not the *grundnorm*, gives meaning to the Constitution and serves as the ultimate source of the law's normativity.

goal is to purify the law and "free the science of law from alien elements," such as morality.[135] But this statement is insufficient to salvage Kelsen's claims. We have already seen that this endeavor fails; the *grundnorm* is a moral principle, at least as we have defined the term.

Moreover, even if one were to call Kelsen's theory "pure," one would still need to ask why anyone might care about such a theory. Kelsen is able to explain why law is obligatory by positing the existence of a basic norm. But that effort succeeds only if one assumes that civil disobedience is never justified and that the constitution has a determinate meaning. Neither assumption is plausible.

So the question must be repeated: Why should we care about a "pure" theory that is unable to explain these basic features of our legal system and that conflicts with core convictions citizens have about the law?[136] Kelsen's defenders must offer some answer if they are to salvage his theory. They must identify some appealing purpose for jurisprudence and explain how Kelsen's regressive approach promotes that objective in an effective way.

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[135] KELSEN, PURE THEORY OF LAW, *supra* note 111, at 1. As Kelsen observes,

> the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. . . . The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines . . . which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.

Id.

[136] Similarly, Kelsen does not explain in any persuasive manner *why* he is concerned about the normativity of the law. Rather, he simply asserts that citizens, when they speak about the law, typically imply a normative meaning. *See, e.g.*, HANS KELSEN, *The Law as a Specific Social Technique, in* WHAT IS JUSTICE?, *supra* note 111, at 232 ("[T]he social behavior of individuals is always accompanied by a judgment of value, namely, the idea that conduct in accordance with the order is 'good,' whereas that contrary to the order is 'bad.'"); *see also* KELSEN, PURE THEORY OF LAW, *supra* note 111, at 104. But this claim is not entirely persuasive. As we have seen, it is certainly possible to speak about "law" in a non-normative sense. *See supra*, Part I; *see also* Honoré, *supra* note 58, at 105. Thus, to justify focusing only on the normative sense of law claims requires some further explanation.

VIII. RONALD DWORKIN'S THEORY OF CONSTRUCTIVE INTERPRETATION

Ronald Dworkin is widely viewed as "the most influential English-language legal theorist of his generation."[137] He has written broadly, offering both abstract theories of interpretation and concrete policy prescriptions. This Part focuses on one core aspect of his work—his theory of judicial interpretation, which is sometimes called a theory of "constructive interpretation."[138]

A. *Dworkin and Rational Reconstruction*

In developing his theory of interpretation, Dworkin's goal is to make sense of legal claims, of "propositions of law." As he observes, individuals often make claims about which decisions are the right ones and about what the law "really" says.[139] When individuals make such claims, Dworkin says, they use an interpretive process of a distinct kind.[140] Specifically, individuals attempt to "impose coherence on the behaviour that makes up a social practice."[141] This involves "proposing some consistent point or meaning the behaviour can be taken to express or exemplify."[142]

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[137] BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 87 (2d ed. 1999); *see also* Cohen, *supra* note 82, at ix ("[T]he jurisprudential writings of Ronald Dworkin constitute the finest contribution yet made by an American writer to the philosophy of law.").

[138] *See, e.g.*, BIX, *supra* note 137, at 83 (describing Dworkin's methodology as one of "constructive interpretation").

[139] Ronald Dworkin, *Legal Theory and the Problem of Sense, in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY, *supra* note 9, at 9 ("Lawyers and laymen accept and assert . . . propositions about what the law of their nation or state 'says' . . . . The question of sense asks what these propositions of law should be understood to mean, and in what circumstances they should be taken to be true or false or neither."); *id.* at 10 ("[These problems of sense] must always be central problems of jurisprudence. Since the use of propositions of law and debate over their truth or soundness are pervasive features of legal practice, no competent account of that practice can ignore the issue of what kind of claims these propositions are used to make.").

[140] *See* DWORKIN, *supra* note 61, at 46-48 (discussing "interpretive" approach to law); Dworkin, *supra* note 139, at 13-15; *see also* BIX, *supra* note 137, at 83.

[141] Dworkin, *supra* note 139, at 13.

[142] *Id.* at 13-14; *see also* BIX, *supra* note 137, at 84 (stating that constructive

What is the "consistent point or meaning" of a legal claim? Dworkin explains that a legal claim represents an assertion that the government's enforcement of a rule is justified.[143] To make sense of that assertion, a theory of law must explain how such a claim of justification might hold true. For Dworkin, this means that the theory must be grounded in political morality.[144] The theory must offer a moral argument for the decision under analysis.

From this perspective, Dworkin says, it should be clear that any theory must satisfy two requirements. First, the theory must fit the specific legal decisions under analysis, which Dworkin calls the requirement of "fit."[145] Second, the theory must explain why the decisions are justified in terms of political morality, a requirement of "justification."[146] Dworkin acknowledges that sometimes more than one theory of political morality can fit the relevant legal materials. When that occurs,

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interpretation "depends upon being able to assign a distinctive value or purpose to the objective of interpretation").

[143] DWORKIN, *supra* note 61, at 108-09 ("[L]egal argument takes place on a plateau of rough consensus that if law exists it provides a justification for the use of collective [force] against individual citizens or groups."); Dworkin, *supra* note 139, at 15 ("An abstract interpretation of legal practice . . . will deploy, as its organizing idea, some account of how the familiar practices and procedures of modern legal systems contribute to the justification of collective coercive force."); *see also* BIX, *supra* note 137, at 84 ("For the constructive interpretation of law, Dworkin states that the purpose of law is to constrain or justify the exercise of government power."); Gavison, *supra* note 9, at 27 (noting that for Dworkin, legal claims assert a "justification of the use of the coercive force of the community").

[144] Dworkin recognizes that it may turn out that there is no theory of justification that fits the legal claims under analysis. Dworkin, *supra* note 139, at 15 ("It must be open to a philosopher of law to conclude that the practice he sets out to interpret has no decent justification . . . ."). In that case, one must conclude that the doctrine is hopelessly confused. *Id.* at 18 ("[I]nterpretation proposes a justification, so that when *no justification at all* is provided by what is law in the pre-interpretive sense, the right interpretive judgment is the sceptical one that denies the title of law." (emphasis added)).

[145] The requirement of "fit" is comparable to the requirement of vertical consistency. *See supra* Part III.D. Thus, Dworkin begins with a set of claims, the "preinterpretive data" of the analysis, and attempts to identify a theory that is consistent with these claims.

[146] *See* DWORKIN, *supra* note 61, at 239 (discussing requirements of "fit" and "justification"); RONALD DWORKIN, A MATTER OF PRINCIPLE 143-45 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 107 (1977).

Dworkin asserts, the interpreter must adopt the principle of charitable interpretation. She must choose the best theory available, one that makes the law the "best that it can be."[147]

Dworkin's argument in support of his interpretive theory is not always easy to follow.[148] Nonetheless, the ultimate methodology that he adopts resembles the theory of rational reconstruction in obvious ways. Like rational reconstruction, Dworkin's approach focuses on normative statements about the law, questions about why legal decisions are justified.[149] Like the rationalizing approach, his methodology can be viewed as an attempt to identify the basis, or premises, for those claims—an attempt to identify a theory that can explain how these propositions of law can be viewed as valid or true.[150] Like rational reconstruction, Dworkin recognizes that such a theory must be rooted in moral premises, and that the ultimate task is to identify the best moral theory that fits the legal decisions under analysis. Arguably, Dworkin even adopts the principle of horizontal consistency, for he emphasizes that any justificatory theory must be internally consistent and coherent.[151]

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[147] *See* Dworkin, *supra* note 139, at 14 ("[N]ormal interpretation aims to make, of the material being interpreted, the best it can be of the enterprise . . . ."); *see also* DWORKIN, *supra* note 61, at 90 (1986) ("General theories of law . . . try to show legal practice as a whole in its best light . . . ."); Ronald Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173, 178 (1985) (arguing that a judge, in deciding which of several interpretations should be adopted, should favor the one that "provides the better justification").

Dworkin acknowledges that there is no way to *prove* conclusively that one theory of morality is better than others. Nonetheless, he notes that each interpreter must make an assessment for himself or herself about the most appealing theory in trying to make the law the best that it can be. *See* Dworkin, *supra* note 13, at 254 ("[T]wo judges, with different background moralities, will offer different sets of principles as the best possible justification of their own legal history. . . . [T]he question of which of these provides the best justification of that history will be a matter of moral judgment."); *see also* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve*, 65 FORDHAM L. REV. 1249, 1258-89 (1997).

> We argue for our constitutional interpretations by offering the best and most honest case we can for their superiority to rival interpretations, knowing that others will inevitably reject our arguments and that we cannot appeal to shared principles of either political morality or constitutional method to demonstrate that we are right.

Id.

[148] Like Kelsen, Dworkin is sometimes criticized for being unnecessarily complex and hard to pin down. *See, e.g.*, Neil MacCormick, *Dworkin as Pre-Benthamite*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 13, at 183 (noting that, given the nature of Dworkin's writing style, "the reader is left to construct a whole view of the Dworkinian Theory out of what seem to him the main points of the position").

[149] Dworkin, *supra* note 139, at 13 ("[A]ny useful account of the truth conditions of such propositions [of law] must . . . be normative rather than simply descriptive.")

These similarities are so striking that one might be tempted, at first glance, to view Dworkin's theory simply as a version of rational reconstruction. Nonetheless, Dworkin's theory departs from the methodology of rational reconstruction in at least one critical respect. Specifically, Dworkin supplements his interpretive approach with an additional principle, one that conflicts with the basic insights of rational reconstruction. This is the principle of "integrity."[152]

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[150] *Id.* at 9.

[151] As far as I am aware, Dworkin does not address the issue of horizontal consistency directly. Nonetheless, he offers a few comments that suggest approval of that requirement. As an initial matter, Dworkin repeatedly emphasizes the need to identify a coherent theory of morality. James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 520 (1999) ("[O]ne aspect of legal practice was the feeling that areas of legal doctrine are constituted by contradictory and potentially imperial ideals . . . . Dworkin, on the other hand, indeed theorists of integrity in general, seeks to eliminate the conflict, to resolve it."); *see also* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 124 (1998) ("Dworkin states that law as integrity 'demands' that the public standards of the community be both made and seen, so far as this is possible, to express a 'single, coherent scheme of justice and fairness.'").

Support for such a view can also be found in Dworkin's comments regarding another controversial subject—his claim that "all (or almost all) legal decisions have a unique right answer." BIX, *supra* note 137, at 87. Although an assessment of the "right answer" thesis is beyond the scope of this paper; the thesis has implications for Dworkin's views on horizontal consistency.

As noted previously, a strong argument can be made that, if incommensurable moral principles exist—if horizontal consistency is rejected—then no morally justified decisions can be made. *See supra* note 75. Some theorists have challenged Dworkin's "right answer" thesis on these grounds. BIX, *supra* note 137, at 88 ("General challenges have been raised to the possibility of right answers under Dworkin's approach based on problems of incommensurability . . . ."); BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 96-106 (1993) (summarizing debate between Dworkin and others on the incommensurability issue). Dworkin has responded by conceding that his right answer thesis "presupposes a conception of morality *other* than some conception according to which different moral theories are frequently incommensurate." Dworkin, *supra* note 13, at 272 (emphasis added); *cf.* Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, 43 ARIZ. L. REV. 251 (2001) (emphasizing that seemingly incommensurable principles—like liberty and equality—do not necessarily conflict).

B. The Principle of Integrity

For Dworkin, the interpretive theory used to justify the law is not simply a method for reflecting and deliberating on the law's validity. Rather, it is a rule of decision for courts. Dworkin asserts that when judges decide new cases, they should first attempt to develop the best moral explanation for past legal decisions. Then they should use that theory to decide future cases. In other words, they should "decide cases in a way which makes the law more coherent, preferring interpretations which make the law more like the product of a single moral vision."[153] This judicial obligation is what Dworkin means when he speaks about the principle of "integrity."

The principle of integrity marks a significant departure from the methodology of rational reconstruction. After all, rational reconstruction seeks only to identify the implicit premises of a set of legal decisions in order to help individuals reflect upon those decisions. But it does not commit the judge (or anyone else) to embrace those premises and apply them to new cases. To the contrary, rational reconstruction tells us that we should adopt a legal principle only if we find the premises of that principle appealing. Dworkin's theory, by contrast, is not merely descriptive. It is prescriptive at its core.[154] It tells courts how they "should" reach legal decisions.

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[152] *See* DWORKIN, *supra* note 61, at 224-75.

[153] BIX, *supra* note 137, at 84; *see also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 146, at 160 ("[M]en and women have a responsibility to fit the particular judgments on which they act into a coherent program of action, or, at least, that officials who exercise power over other men have that sort of responsibility."); Dworkin, *supra* note 13, at 270 ("[J]udges must nevertheless accept a responsibility of consistency according to their own best judgment of what consistency requires. Legislatures have no such responsibility.").

[154] Gavison, *supra* note 9, at 33 ("Dworkin asserts that legal theories are committed theories, that their cutting edge is the guidance of judges in hard cases. It is implied that one of the criteria of adequacy of a legal theory should be its conduciveness to the making of 'good' decisions."); Simon, *supra* note 151, at 124 ("It is important to note that the notion of coherence in Dworkin's theory is not

Understandably, perhaps, the principle of integrity has proved controversial. Why should a court apply principles used in prior cases, especially if the court concludes that those principles are unjust?[155] If Dworkin seeks to persuade us that judges are obligated to follow the principles implicit in past decisions, he must offer an argument in support of that position. The argument, moreover, must be of a certain sort. It must be a moral argument, since only moral arguments (by definition) can generate obligations of obedience.

C. *Deontological Arguments for Integrity*

Over the years, Dworkin has offered a range of arguments in defense of integrity.[156] These arguments have typically been grounded upon deontological principles of morality. That is to say, rather than defend integrity because it generates good consequences, Dworkin has argued that integrity is good in itself.[157]

Dworkin defends this claim by appealing to his readers' intuitions about "fairness."[158] For example, Dworkin asks the

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merely descriptive, . . . it is prescriptive through and through. The decision must endorse the interpretation that best justifies the extant legal practice and institutions as a coherent scheme of principle."); *see also* Dworkin, *supra* note 13, at 267 ("[E]ach official must believe that his use of force against individual citizens is justified, not only by his own opinions of their rights, but by some more general theory which can be said to be the theory that underlies the law of the community as a whole.").

[155] Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2114 (1996) (noting that, in obeying the principles of stare decisis blindly, courts "disserve justice; they bind themselves and the future to the missteps and wrong turns of an imperfect past"). In that sense, Dworkin's theory is conservative in nature, potentially binding officials to support immoral regimes.

[156] Boyle, *supra* note 151, at 504 ("Over time, Dworkin's answers have varied, reflecting—I think—the multiplicity of reasons we have for finding 'integrity' attractive.").

[157] Peters, *supra* note 155, at 2041 ("While consequentialist theories of stare decisis assign value to [adjudicative consistency] only to the extent that it serves the interests of justice in the long run, deontological theories of stare decisis assert that the value of adjudicative consistency is inherent, and therefore unaffected by whether it results in justice.").

[158] Dworkin, *supra* note 13, at 256 ("I believe there are reasons of fairness

reader to imagine a "checkerboard" statute, in which different individuals are treated differently based on random or arbitrary factors.[159] Dworkin argues that most people have deep-seated intuitions that this is wrong.[160] Those intuitions, Dworkin argues, reflect a widespread belief in adjudicatory consistency, in the idea that courts should decide cases based on consistent principles.[161]

Dworkin asserts that adjudicatory consistency is also supported by fairness arguments that resemble the principle of fair play.[162] As he observes, citizens often bear significant burdens in order to establish and maintain an organized society. Fairness, Dworkin says, suggests that citizens who bear these burdens are entitled to the consistent application of the laws upon which they relied.[163]

The persuasiveness of Dworkin's argument depends in part on whether one agrees with his claim that integrity is intuitively compelling. A moment's reflection raises serious doubts about that claim. Consider, for example, Dworkin's discussion of a hypothetical law in Nazi Germany, a law that confiscates Jewish property and transfers it to aryans. Dworkin assumes for the sake of argument that the principle underlying these decisions is the belief that "Jews are less worthy than ary-

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why the principles presupposed by past legal decisions should be applied in future decisions of the same community as well.").

[159] Peters, *supra* note 155, at 2092. Dworkin

> posit[s] a rogues' gallery of potential checkerboard schemes, each one more fearsome than the last: imposition of strict liability on automobile manufacturers but not on washing machine manufacturers; prohibition of racial discrimination on buses but not in restaurants; criminalization of abortion for women born in even years but not for women born in odd ones.

Id. at 2092-93.

[160] For discussion and citations, see *id.* at 2079-80.

[161] *Id.* at 2079-80 ("For Dworkin, then, integrity is an invisible planet, a hidden 'political ideal' that compels government to act consistently from case to case just as justice compels government to act correctly in each case. Integrity is a distinct, independent, self-contained, substantive norm.").

[162] *See supra* Part VI.A (discussing principle of fair play in context of civil disobedience).

[163] Dworkin, *supra* note 13, at 258 ("If the people accept the burdens of a particular process, they have some claim to the benefits of decisions reached under that process as well.").

ans."[164] Under Dworkin's analysis, fairness requires the consistent application of this rule to future cases. Moreover, under the principle of fair play, aryans who have suffered deprivations under Nazi rule, like being drafted, could point to the principle of integrity to argue that courts are obligated to apply the decisionmaking principle in subsequent cases involving Jews.[165]

Is that intuitive? Few individuals, I imagine, would say that courts have an inherent obligation to observe the anti-semitic principle in subsequent cases.[166] In this light, Dworkin's argument for the intuitive appeal of integrity seems painfully strained.[167] Nonetheless, Dworkin has a response to this criticism, one that will be familiar from our discussion of civil disobedience. Though individuals may have an obligation, rooted in "integrity," to obey the law in all cases, they might also have an obligation, rooted in "justice," to disobey the law where it leads to unjust results. In other words, Dworkin suggests, courts sometimes face a conflict between the demands of "integrity" and "justice."[168] Where the demands of justice are sufficiently powerful, the court may choose to depart from past principles.[169] In this way, Dworkin attempts to reconcile his embrace of integrity as a deontological principle, with common intuitions that disobedience is sometimes obligatory.

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[164] *Id.* at 257.

[165] *Id.* Dworkin expressly acknowledges that possibility. As Dworkin says, "A judge might find, that is, just in the fact that the Nazi regime is an operating political system which enjoys the respect and compliance of officials and citizens alike, enough to force him to acknowledge that the aryan plaintiff has at least some weak case in political morality for what he asks." *Id.* at 258.

[166] Moreover, consider the implications of such a belief in the case at hand. The principle of integrity means that Nazi citizens who have suffered deprivations for the state have an entitlement to the consistent application of anti-semitic principles at the expense of others—Jews—who have suffered even more. It seems odd that the principle of fair play—a principle that ostensibly seeks to ensure a fair distribution of costs and benefits—should be used to disadvantage the most disadvantaged group in society. Moreover, what of the rights of Jewish citizens? Do their deprivations merely give them a right to the principled application of the anti-semitic principle?

[167] Christopher Peters has criticized Dworkin's intuitionist argument for integrity on other grounds. Among other things, Peters observes that our intuitions about integrity need not imply the existence of an independent principle of justice. Rather, those intuitions can just as easily be explained in terms of our beliefs regarding the injustice of the specific results. As Peters notes, the problem with checkerboard statutes is that we have a sense that some individuals are being treated based on factors that are irrelevant or unjust—even if we are not entirely positive which those factors are. Peters, *supra* note 155, at 2097 ("[W]e disapprove of checkerboard schemes based on impermissible criteria because we know that they too require unjust treatment of people, treatment based in every case on an irrelevant factor."). They provide evidence, in short, that the decisions themselves have an unjust effect on citizens.

Peters observes that "[t]he only way to test whether integrity plays some role, however small, in informing our attitudes toward government decisionmaking is to identify some case or type of case in which government can be said to be acting inconsistently in principle but in which this inconsistency has no corresponding unjust effect on people. . . . The problem, though, is that we can imagine no such test case." *Id.* at 2103.

Nonetheless, as our previous discussion of civil disobedience suggests, this attempt to make sense of normative claims by positing a medley of moral principles is problematic. Dworkin apparently assumes that the conflict between "integrity" and "justice" can be resolved in a justified manner. But for that to occur, one must also assume that a higher principle exists to mediate between the competing norms.

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[168] *See, e.g.*, Dworkin, *supra* note 13, at 259 ("[T]he community's political history [i.e. its past decisions] often provides an independent ground for a moral argument that may compete with, though it may fall before, other moral arguments that are disconnected from that history."); *cf.* Ronald Dworkin, *Reflections on Fidelity: Originalism, Scalia, Tribean* , 65 FORDHAM L. REV. 1799, 1816 (1997) ("I agree with [Robin West] that there is nothing in my account of constitutional adjudication, even under the moral reading, that insures that constitutional law will not be conspicuously unjust . . . .").

[169] *See, e.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 146, at 326-27, 341-43; Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve*, *supra* note 147, at 1263 (acknowledging that considerations of, among other things, "justice" might in some cases "trump fidelity," or "integrity"); Dworkin, *supra* note 139, at 17 ("Suppose we think that Siegfried's legal system is so wicked that it can never provide any justification at all, even a weak one, for state coercion, so that in every case Siegfried, if he can get away with it, should simply ignore legislation and precedent altogether."); Dworkin, *supra* note 13, at 258 (noting that, even though integrity imposes an obligation upon Nazi courts to implement an anti-semitic principle, "it does not follow that this or any other statute enacted by the Nazi regime should actually be enforced. In this case there are very strong, perhaps compelling, moral reasons of a different sort for refusing to enforce the statute . . . ."); *see also* BIX, *supra* note 137, at 86 n.20 (stating that for Dworkin, "if the legal system within which one is working was sufficiently wicked, the judge should not try to make the legal system 'the best it can be;' he or she should just lie about what the law requires"); Hart, *supra* note 84, at 40-41 ("Dworkin [acknowledges] that where the settled law is morally iniquitous [,] principles forming part of the 'best' justification of it might be morally so bad that the judge's moral duty might be to lie rather than enforce the legal right or duty identified by such principles.").

The higher principle must be the ultimate source of value—for it dictates when a court should act with integrity and when it should not. This conclusion undercuts the idea that integrity is an ultimate deontological principle.[170] Instead, the analysis suggests that, if the principle of integrity has force, it must be because it promotes a higher moral end. The principle of integrity, thus, must represent an *instrumental* norm—one that is justified, if at all, on consequentialist grounds.[171]

D. Consequentialist Arguments for Integrity

Consequentialism offers, on first glance, an appealing basis for justifying integrity. In many cases, following past principles will generate good consequences. Arguments for following past principles include, "[t]he protection of reliance interests, the need for certainty and predictability in the law, the goal of judicial efficiency, the promotion of confidence in something called 'the rule of law,' the imposition of constraints on judicial lawmaking— the list is a familiar one to any lawyer."[172]

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[170] *Cf.* Peters, *supra* note 155, at 2114 ("Courts grasp at thin air when they search for reasons why stare decisis must be an intrinsic good.").

[171] *Id.* at 2040 (contending that consequentialist arguments for integrity "assign no inherent value to adjudicative consistency itself; rather, they value consistency only to the extent that consistency serves justice-related [or moral] ends").

[172] *Id.* at 2112-13. Peters adds, "these sorts of reasons are purely consequentialist ones; they are strategic reasons to decide a later case in the same way as a previous one, but they are not reasons for following precedent *qua* precedent." *Id.*; *see also* Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 FORDHAM L. REV. 1313, 1316 (1997) ("A common, but I think incomplete, answer is that consistency or integrity in the application of public force renders that force more predictable, and hence manageable, than would be the case if state force was to be applied arbitrarily . . . .").

These types of arguments in defense of adjudicative efficiency are analogous to arguments typically advanced in defense of the ideal of a "rule of law." For a good summary of arguments for and against rule of law ideals, see Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62-69 (1992); *see also* Robin West, *Is the Rule of Law Cosmopolitan?*, 19 QUINNIPIAC L. REV. 259, 262 (2000).

> [V]irtually all judges, most lawyers and most lay people agree that [the rule of law] requires what jurisprudential scholars call "horizontal equity":

At the same time, consequentialism does not always support the principle of integrity; sometimes, the consequentialist benefits of following past principle will be negligible. In those cases, no significant obligation to act with adjudicative consistency will exist, and a departure from past principle will be justified whenever any significant moral reason exists to do so.[173]

This is certainly not the way Dworkin envisions the principle of integrity. Dworkin sees the principle of integrity as an independent moral principle that applies in every case, one that can be overcome only by the most extreme countervailing moral considerations. But the consequentialist approach places the principle of integrity in a far more modest light. Rather than viewing integrity in near-absolute terms, the consequentialist justification requires the court to assess the consequences of acting with adjudicative consistency on a case-by-case basis. Integrity is thereby transformed into a pragmatic doctrine of varying significance, an instrumental tool for achieving beneficial ends.[174] Consequentialism, in sum, can-

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> judges must treat like cases alike. Similar cases must be decided similarly. This only seemingly banal and simple constraint has been expressed in a number of ways. Judicial decisions must, to use Dworkin's formulation of this basic intuition, have *integrity*.

Id. David Strauss offers another consequentialist argument for adjudicative consistency, which he calls a "traditionalist" argument. As he says,

> [t]he central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time. Judgments of this kind embody not just serious thought by one group of people, or even one generation, but the accumulated wisdom of many generations. They also reflect a kind of rough empiricism: they do not rest just on theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough.

David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891-92 (1996).

[173] Some commentators have suggested that the consequential benefits of adjudicative consistency are frequently overstated. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 66-69, 72-73, 75-79 (1961); Laurence Goldstein, *Some Problems About Precedent*, 43 CAMBRIDGE L.J. 88, 102-07 (1984); Earl Maltz, *The Nature of Precedent,* 66 N.C. L. REV. 367, 368-69, 370-71 (1988).

[174] By contrast, a judge who embraces the methodology of rational reconstruc-

not justify Dworkin's broad, categorical claims for integrity's normative force.

E. Interpreting Interpretation

Perhaps recognizing the weakness in his moral argument for integrity, Dworkin advances another, distinct argument for the principle. He argues that integrity is justified in the same way that any principle is justified: The principle represents the best justification for existing practices and, specifically, the best explanation for the way judges actually interpret the law.[175] According to Dworkin, courts typically decide cases as if they are under an obligation to act with adjudicative consistency.

This alternative argument, however, is deeply problematic. As an initial matter, one might doubt that integrity really is the best interpretation for current practices. To prove his case, Dworkin would need to show that an independent (deontological) principle of integrity both "fits" and "justifies" the courts' interpretive practices. But we have already seen that consequentialism fits past practice too.[176] Arguably, it provides a superior fit; consequentialism alone provides a co-

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tion can incorporate consequentialist arguments for integrity into his analysis. Using rational reconstruction, the judge can identify the premises of past precedent. If the judge finds the premises appealing, she will act with integrity and apply the premises to subsequent cases. But if the judge concludes that the premises are unjustified, her analysis becomes more complex. She may still decide to follow the principles of the past if the consequentialist arguments in support of integrity are powerful. Ultimately, she must balance the beneficial consequences of following past principles with the costs of reaching an unjust result in the specific case.

[175] Dworkin, *supra* note 168, at 1813 ("I defended my own account of how interpretive concepts should be interpreted . . . by calling attention to the structure of social practices . . . in which people back social claims with arguments trying to show how a practice would go better if their claims were recognized as sound or appropriate within it.").

[176] Arguably, consequentialist arguments offer a better "fit" for Supreme Court practice. In its most extensive discussion of stare decisis in recent times, the justices characterized adjudicatory consistency in instrumental, not deontological, terms. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992); *see also* Peters, *supra* note 155, at 2113-14 (discussing the *Casey* Court's "prudential and pragmatic" approach to precedent).

herent explanation why obeying past principle is only a prima facie duty, not an absolute one. In this regard, consequentialism seems to offer a better, more plausible theory of the courts' interpretive practices than deontological principles.

In any event, even if one were to assume that a deontological principle of integrity is the best interpretation of our interpretive practices that does not mean that courts should necessarily adopt that principle as their own. The mere fact that courts have acted a certain way in the past does not give us a reason to follow those practices in the future. We might conclude, on reflection, that courts have adopted the wrong interpretive approach. Dworkin, in other words, does not tell us why the best interpretation of past practice should have prescriptive power over us. As we have seen, that claim requires a separate moral argument, an argument that Dworkin has failed to provide.[177]

Dworkin has a response to this criticism, but it is entirely unpersuasive. He argues that integrity's validity does not depend on finding a separate moral argument in its defense because other valuable disciplines—such as mathematics and science—are self-contained systems of thought that lack "external" support. Thus, Dworkin affirms, "it seems plausible to say, as many philosophers do, that an entire domain of supposed knowledge or belief, like science as a whole or a comprehensive moral system, cannot have an external justification and does not need one."[178]

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[177] Jed Rubenfeld has offered a similar critique of Dworkin's theory. Rubenfeld argues that Dworkin's claim—that judges should embrace integrity because integrity offers the best interpretation of their own practices—is circular. To justify integrity, Rubenfeld concludes, Dworkin must rely on some external justification. Simply referring to the judge's own practices does not explain why integrity is an appealing principle. Rubenfeld, *supra* note 26, at 1475-76 (suggesting that, to "validate his interpretation of interpretation, Dworkin cannot *merely* say that it makes interpretation the best that it can be. He must also say: . . . this is the *right* interpretation of interpretation"); *see id.* at 1477 ("If this is right, then constitutional law must look to criteria outside the philosophy of interpretation to decide what sort of interpretation is appropriate to it.").

[178] Dworkin, *supra* note 168, at 1812 (citations omitted); *id.* at 1814 (affirming that his aim is "to rely on their solidity [of math and science] to show the fallacy in Rubenfeld's argument. . . . A theory may be complete and coherent even

The problem with this analogy to mathematics and science might be patent. Those disciplines simply do not generate the kind of prescriptive force that Dworkin claims for the principle of integrity. For example, one might support scientific research on nuclear fission in the hope that it generates new insights into alternative energy sources. Nonetheless, engaging in that work does not create an obligation to go further and build a nuclear power plant based on the research. An obligation to build a nuclear power plant exists only if doing so serves moral ends (by definition).

The same point can be made about rational reconstruction. One might believe that undertaking the rationalizing analysis is valuable, in part because it allows us to deliberate more openly and reflectively on our decisions. But that certainly does not mean that a court should adopt the results of that analysis when issuing decisions. As we have discussed, a court should do so only if those decisions are morally justified.

Dworkin's references to mathematics and science, in other words, cannot salvage integrity as a prescriptive principle. Like mathematical and scientific research, the insights of rational reconstruction should be embraced and implemented only if we have good moral reasons to do so. The mere act of identifying the premises of our practices does not give us independent reasons to adopt those assumptions. Premises are not self-generating principles of prescription.

CONCLUSION

Legal theory has failed to confront some of the most basic questions about its overarching purposes and methods. As I have argued here, a critical task for theorists today is to clarify the ultimate goal of their endeavors and to explain how their

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though it can appeal to no wholly external support."); *id.* at 1813 ("[I]f [Rubenfeld's] argument were sound, it would follow that science and mathematics and other apparently well-established domains of thought are also self-defeating."). For the purpose of this discussion, I will assume that Dworkin is correct in suggesting that mathematics and science are self-contained systems of thought, in the sense that these systems of thought are based on axioms that lack external justification or support.

methodology is well suited to that objective. I have offered an illustration of this approach in this article, advancing a preliminary defense of the methodology of "rational reconstruction."

Undoubtedly, some readers will find this methodology unsatisfying. Many of us have a deep-seated desire for authoritative principles that tell us how we should act and how we should interpret the law. Rational reconstruction, however, tells us that no definitive principles exist to make those determinations. It tells us, instead, that any normative claim about the law must rest on underlying assumptions that are always up for debate and reconsideration.

Rational reconstruction, in this way, does not offer answers. It is rather a tool for making more reflective judgments. It seeks to bring to light what has been suppressed, to make explicit what has been implicit, to encourage *self-awareness*. It rests on the assumption that individuals can be trusted to make decisions with their eyes wide open. It assumes, in short, that individuals can think for themselves.

Not everyone will agree with this assumption. Some may fear that the public's awareness of the uncertain premises of the legal system will breed disrespect for the law and for government and thereby encourage disorder.[179] Similar fears, conscious or not, may motivate Dworkin's efforts to privilege the principles of the past and Kelsen's attempts to identify a basic norm that commands citizens to obey the nation's constitution.[180]

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[179] Some of the leading arguments for positivism have been based on these fears. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 186 (Isaiah Berlin et al. eds., The Noonday Press 1954) (1832) ("[T]o proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy . . . .").

[180] This may be somewhat unfair to Kelsen. Kelsen never argued that the basic norm, in fact, generates obligations. It was, for Kelsen, a hypothetical norm: If the basic norm is valid, then we must obey the Constitution's commands. Nonetheless, Kelsen's argument can be easily construed as offering a "reason" for obeying the Constitution, even if he did not expressly intend for it to be used in that way. Indeed, some modern-day theorists seem to draw upon Kelsen's concept of a basic norm in arguing that the Constitution obligates inherently. *See, e.g.*, Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (affirming that our Constitution is simply our basic norm, which we accept without argument). This result is rather ironic, since Kelsen attacked other theories on

These concerns do not call into question the insights offered by the rationalizing methodology (such as the insight that legal claims rest on moral premises). Rather, they call into question the benefits of *publicizing* those insights widely. One who believes that the dangers of publicity are significant may conclude that it is better to tell the public "noble lies"—comforting fictions about the authoritative status of our legal system and the binding nature of our laws—in the hope of preserving social stability and cohesion.[181]

Whether a "noble lie" of this sort is ever justified, and whether it is justified in our own time, is a question that this paper does not answer. But the implications of repressing the insights of the rationalizing methodology should be confronted directly. In essence, it means that we are afraid of thinking too much about the validity of law's commands and about the uncertain foundations of our legal and social system. We are afraid, in other words, of too much understanding.

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the grounds that they were unduly conservative in nature. *See* HANS KELSEN, *Law, State, and Justice in the Pure Theory of Law*, *in* WHAT IS JUSTICE?, *supra* note 111, at 297 (contending that the "historical function of the natural-law doctrine was to preserve the authority of the positive law"); KELSEN, PURE THEORY OF LAW, *supra* note 111, at 69 (The idea that law is supported by absolute moral principle "amounts to an uncritical justification of the national coercive order that constitutes this community").

[181] In *The Republic*, Plato describes a utopian society that is based on a myth that the creator "mixed a different metal in members of each of the three social classes; gold within rulers, silver within administrators, and iron within the farmers and craftsmen." John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1157 n.4 (1985). *See generally* PLATO, THE REPUBLIC 106-07 (F. Cornford trans., 3d ed. 1979). This "noble lie" produces "a narcotic effect that artificially makes the populace care more for their commonwealth." Moon, *supra*, at 1157 n.4 (quoting PLATO, THE REPUBLIC, *supra*, at 107); *see also* David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 TENN. L. REV. 279, 319 (1986) ("The purpose of this is to make them defend their city 'as though the land they are in was a mother.'" (quoting PLATO, THE REPUBLIC, *supra*, at 414e)).

BARBARIANS AT THE GATES: A POST-SEPTEMBER 11TH PROPOSAL TO RATIONALIZE THE LAWS OF WAR

William Bradford[*]

> "And were a civilized nation engaged with barbarians, who observed no rules of war, the former must also suspend their observance of them, where they no longer serve to any purpose; and must render every action or recounter as bloody and pernicious as possible to the first aggressors."[1]

I. INTRODUCTION

A. Humanizing War with Law: Aspiration

Since the dawn of man,[2] war[3] has been justified as an object of divine ordination,[4] the natural state of humanity[5] and a tool in the progressive betterment of character,[6] culture[7] and civilization.[8] In this hyper-ideological age tragically

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This Article is dedicated to memory of the victims of September 11, 2001, and to their families, and to all the members of the United States Armed Forces, upon whom the defense of civilization against barbarism depends.

[1] DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 20 (Open Court Publ'g Co. 1930) (1777).

[2] War is as old as humanity. *See* LAWRENCE H. KEELEY, WAR BEFORE CIVILIZATION 3-5 (1996) (examining anthropological research tracing war to before the origin of the human species); Claudio Cioffi-Revilla, *Ancient Warfare: Origins and Systems*, *in* 2 HANDBOOK OF WAR STUDIES 59 (Manus I. Midlarsky ed., 2000) (noting that, in every historical age, war has been admitted among the relations between peoples as a legitimate means of protecting rights and settling disputes).

[3] Although the issue of whether an armed conflict is a "war" in the constitutional sense is relevant under United States law, the terms "war" and "armed conflict" have become essentially synonymous in international law. EDWARD K.

KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 1 (1992). Both are employed in reference to the phenomenon of organized violence between contending political communities, whether such violence is directed across or within state borders. *See* Lawrence Freedman, *Introduction* to WAR 3 (Lawrence Freedman ed., 1994) (defining war as a state of law involving a high degree of violence in the relations between organized human groups).

[4] *See, e.g.*, ST. AUGUSTINE, CITY OF GOD 392 (Gerald G. Walsh et al. trans., Vernon J. Bourke ed., Image Books 1958) (1467) (contending that, despite its miseries, war is a state of affairs of which God approves); ST. THOMAS AQUINAS, SUMMA THEOLOGICA 152-62 (Fathers of the English Dominion Province trans., Burns Oates & Washbourne Ltd. 1912) (same); Darrell Cole, *Death Before Dishonor or Dishonor Before Death? Christian Just War, Terrorism, and Supreme Emergency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 98-99 (2002) (contending that "we fail to be all that we are intended by God to be . . . when we refuse to fight just wars" and "soldiers are elevated by God through [war]").

[5] *See* THOMAS HOBBES, LEVIATHAN 86-87 (Nelle Fuller ed., Encyclopedia Britannica, Inc. 1952) (1651) (describing natural condition of mankind as a state of perpetual war of all against all—"*bellum omnium contra omnes*"); KONRAD LORENZ, ON AGGRESSION 271-72 (Marjorie Kerr Wilson trans., Harcourt, Brace & World, Inc. 1966) (1963) (suggesting a primitive force in man impels him to war); NICCOLO MACHIAVELLI, THE PRINCE 21 (W.K. Marriott trans., Encyclopedia Britannica, Inc. 1952) (1513) (positing war as an evil necessary to the existence of the state); STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 306-10 (2002) (suggesting human violence has biological and cultural determinants). Liberation theorists, developing a parallel body of thought, suggest war is the vehicle through which "the embittered, the dispossessed, the naked of the earth, the hungry masses yearning to breathe free, express their anger, jealousies and pent-up urge to violence." JOHN KEEGAN, HISTORY OF WARFARE 56 (1994).

[6] *See generally* JOHANN CASPAR BLUNTSCHLI, DAS MODERNE KRIEGSRECHT (1866) (stating that war is an element of the world order established by God which fosters the noble virtues of man—courage, self-sacrifice, obedience); KEITH L. NELSON & SPENCER C. OLIN, WHY WAR? (1979) ("[War] fosters the noblest virtues of man, courage, self-denial, obedience to duty, and the spirit of sacrifice; the soldier gives his life. Without war the world would stagnate and sink into materialism." (quoting letter from Helmuth von Moltke to J.K. Bluntschli (Dec. 11, 1880), *in* LETTERS ON WAR AND NEUTRALITY 25 (Thomas H. Holland ed., 1909))).

[7] *See* KEEGAN, *supra* note 5, at 46 (positing that war may be the product of the forceful perpetuation, against resistance, of culture, defined as "that great cargo of shared beliefs, values, associations, myths, taboos, imperatives, customs, traditions, manners and ways of thought, speech and artistic expression which ballast every society").

[8] *See* 1 HERBERT SPENCER, PRINCIPLES OF SOCIOLOGY 490-91 (1882) (describing war as means for maintaining ethical health of nations and progressive evo-

symbolized by September 11, 2001, war, to the dismay of those who hoped material transformations might weaken its siren's call,[9] waxes ever more destructive,[10] driving efforts to abolish force as a moral imperative[11] and, less quixotically, to induce compliance with an accreting body of rules, known as international humanitarian law (IHL),[12] to "humanize" armed con-

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lution of species); DONALD A. WELLS, THE WAR MYTH 78 (1967) (noting that nineteenth century continentals analogized war to the process of national or cultural selection whereby the most fit civilization(s) would survive a contest with lesser civilizations and that this relentless war of extermination was essential to human progress).

[9] *See* KEEGAN, *supra* note 5, at 58 (examining "[e]xpectations that . . . rising living standards, literacy, scientific medicine, the spread of social welfare" would trigger "the arrival of effective anti-warmaking attitudes in the world").

[10] *See* R.J. RUMMEL, DEATH BY GOVERNMENT 13 (1994) (noting that in the last century alone, wars have claimed the lives of 203 million combatants and civilians and squandered vast fortunes).

[11] "War abolitionists," committed to the view that the horrors of war can be mitigated only by its elimination, cling to the hope that "at some future point reason will prevail and all international disputes will be resolved by nonviolent means." Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 4, 13. The Kellog-Briand Pact is a monument to this creed. *See* General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57 (renouncing recourse to war for the solution of international disputes). For many, the abolition of war is a Kantian imperative, outlawing the use of force against human beings. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 101 (H.J. Paton trans., 1964) (1785) (stating that one should always act so as to treat humanity "*never merely as a means*, but always *at the same time as an end*"). For a discussion of war abolitionism, see FRANK PRZETACZNIK, THE PHILOSOPHICAL AND LEGAL CONCEPT OF WAR 250 (1993).

[12] IHL, also known as the "laws of war," is a set of "articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements" that serves as the normative and positive structure of legal relations during armed conflict. MICHAEL WALZER, JUST AND UNJUST WARS 44 (1977). IHL is thus related to, although distinct from, "military law," defined as the "domestic, foreign, and international law associated with the planning and execution of military operations." Robert L. Bridge, *Operations Law: An Overview*, 37 A.F. L. REV. 1, 3 (1994). Many ancient cultures, religions and belief systems developed rules distinguishing between combatants and noncombatants and limiting methods and means of warfare and, as such, the roots of IHL are "as old as war itself, and war is as old as life on earth." JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 6-7 (1985); *see also* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES 7 (1993) [hereinafter MERON, HENRY'S WARS] (describing regulation of medieval warfare by a set of customs and canon laws known as the *jus armorum* (code of chivalry)); LAO TZU, TAO TE CHING 34 (David

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Hinton trans., Counterpoint 2000) (citing ancient Chinese doctrine that he who delights in the slaughter of men cannot have a place in the State); Josiah Ober, *Classical Greek Times*, *in* THE LAWS OF WAR 12 (Michael Howard et al. eds., 1994) (describing legal constraints of ancient Greek warfare); Karima Bennoune, Note, *As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 605, 617-27 (identifying Islamic legal proscriptions on methods, means and objects of warfare). Still, limits on warfare remained largely customary as late as the Middle Ages, and the evolution of a positive regime of IHL traces to the late Renaissance scholars Grotius, Vattel and Bynkershoek, who carried forward medieval chivalric codes while interweaving theories of natural law, theology and secular morality. *Id.* at 211-13. The nineteenth and twentieth centuries witnessed the systematic codification of customary principles of IHL beginning with the Lieber Code, drafted by Francis Lieber, a law professor at Columbia University with sons in both the Confederate and Union armies, at the behest of President Lincoln. Kenneth J. Keith, *Rights and Responsibilities: Protecting the Victims of Armed Conflict*, 48 DUKE L.J. 1081, 1090 (1999). The Lieber Code established explicit rules regarding rights and duties of combatants and non-combatants, and in particular prisoners of war, applicable during the United States Civil War. *See* Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) [hereinafter Lieber Code]. The Lieber Code inspired imitations; states borrowed liberally from its provisions in crafting their own military manuals. Geoffrey Best, *The Restraint of War in Historical and Philosophical Perspective*, *in* HUMANITARIAN LAW OF ARMED CONFLICT 15 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (describing Lieber Code as the "Adam and Eve of all subsequent law of war manuals"); *see* THOMAS ERSKINE HOLLAND, THE LAWS OF WAR ON LAND app. 1, at 72-73 (Scientia Verlag Aalen 1977) (1908) (listing states adopting military manuals incorporating the Lieber Code, including Britain, France, Spain, Italy and Portugal); DONALD A. WELLS, THE LAWS OF LAND WARFARE 4 (1992) (noting near-direct translation of Lieber Code in military manuals of Germany, France and Russia). Over the next nine decades, IHL was progressively codified in treaties, now numbering in the dozens, the object and purpose of which has been to provide a conventional framework for the customary rules and principles evolving in the direction of greater protections for individuals. IHL is thus both the point of origin as well as the very core of human rights law. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 244 (2000) [hereinafter Meron, *Humanization*] (tracing complementary development of IHL and human rights law). The strand of IHL known as "*jus ad bellum*" or "Hague law" answers questions such as when resorting to warfare is permissible and what means and methods may be employed therein, whereas "*jus in bello*" or "Geneva law" specifies who and what are legitimate subjects of war. *See* William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 COLUM. J. TRANSAT'L L. 767, 770 (1999) (distinguishing between principle components of IHL). By strictly limiting, rather than expressly authorizing, certain forms of conduct in war, IHL is a "prohibitive" legal regime. Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 324 (1951). Several fundamental IHL principles have been distilled: 1) non-combatants are immune and entitled to active protection by belligerents; 2) a combatant rendered *hors de combat* by virtue of wounds or surrender may not be attacked; 3) the wounded and sick are the responsibility of flict.[13] This progressive regulation[14] has met nearly universal approbation:[15] many ethical people, instinctively antipa-

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the party in whose power they are located; 4) prisoners of war are entitled to basic rights and privileges, including immunity from reprisal; 5) all persons are entitled to be protected against torture and denial of judicial guarantees; 6) methods of warfare are limited and means which cause unnecessary suffering are prohibited and 7) distinctions must be drawn between civilian and military targets, with only the latter subject to attack. PICTET, *supra*, at 61-72.

[13] *See* Bennoune, *supra* note 12, at 608 (noting that the essential goal of IHL is to place "humane restrictions" on war). Not all admit this possibility; for many, humanization of war requires its abolition. Meron, *Humanization*, *supra* note 12, at 240. However, the notion that wars can and should be limited by sacrificing some aspects of military expediency to the alleviation of suffering dates back to antiquity. *See* PICTET, *supra* note 12, at 6 (contending that "traces of a desire to attenuate the horrors of combat" can be located in earliest mankind); TELFORD TAYLOR, NUREMBERG AND VIETNAM 20 (1970) (stating that "the concept that the ravages of war should be mitigated . . . by prohibiting needless cruelties" is an "instinct almost as old as human society"); QUINCY WRIGHT, A STUDY OF WAR 160-61 (2d ed. 1965) (correlating "rise of a civilization" with legal regulation of war).

[14] IHL is an ongoing and intensive process of international deliberation and negotiation oriented toward the development and codification of formal rules restricting the methods and means of war and protecting certain persons and things from attack. R.C. HINGORANI, PRISONERS OF WAR 195 (1982). Evidence is discernible in the development of international instruments, the jurisprudence of international and domestic tribunals, state practice and statements by government representatives.

[15] Prior to the advent of the modern IHL regime in the nineteenth century, military strategists and natural law theorists insisted that the "humanization" of war could only be obtained in the absence of legal regulations on the ground that mitigating the intensity of war would enhance its social acceptability and thereby prolong it. *See, e.g.*, Lieber Code, *supra* note 12, sec. II, para. 29 ("The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief."); WALZER, *supra* note 12, at 47 (citing Prussian General von Moltke for the proposition that the "greatest kindness in war" is not the mitigation of combat but the swift defeat of an enemy). Natural law critics of the legalization of war also base their arguments on efficiency considerations, maintaining that the odds of success in war are inversely proportional to the degree of adherence to legal restraints on the conduct of military operations, as well as the absolute right to engage the enemy in any manner with any means. *Id.*; *see also* STEPHANIE GUTMAN, THE KINDER, GENTLER MILITARY 275 (1999) (arguing that in combat the "fiercer, angrier, most-blood-lusting force will win" and that armies must be guided not by law but rather "driven by . . . a killer instinct"). A shrinking number of commentators still rejects much of the IHL canon as an infeasible, if philosophically attractive, attempt to "shift the balance established between military necessity and humanitarian principles in such a way as to hamper the ability of states to use military force." Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 108, 146 (1985).

thetic to war,[16] welcome any anodyne and few proclaim its absolute independence from legal regulation.[17] Indeed, the distinction between "murder" and "killing in war" is now difficult to sustain without reference to positive law,[18] and the term "war crime"[19] has entered the popular lexicon[20] accompanied by images of atrocity that provoke moral outrage.[21] Empirically, states and individuals obey IHL at least some of the time,[22] and the phrase "laws of war" is no longer ipso facto oxymoronic.

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[16] *See* ROBERT L. O'CONNELL, OF ARMS AND MEN 24 (1998) (noting anthropological research suggesting an inclination to "fight by the rules" and limit war is an emotional vestige of intraspecific combat within groups of our hominid ancestors).

[17] *See* HINGORANI, *supra* note 14, at 6 (highlighting formal recognition of obligations *erga omnes* under IHL); J.M. SPAIGHT, WAR RIGHTS ON LAND 4 (1911) (observing that, by the turn of the twentieth century, "no nation . . . has not rendered homage to the laws of war"); WALZER, *supra* note 12, at 33 (suggesting that recognition of legal responsibility for the conduct of military operations has undergone universalization in the post-United States Civil War era)

[18] *See* TAYLOR, *supra* note 13, at 19 ("War consists largely of acts that would be criminal if performed in time of peace . . . [but are] not . . . because the state of war lays a blanket of immunity over the warriors."). For discussion of the distinction between murder and the taking of life in war, see Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 761-62 (2003).

[19] The term "war crime" refers generally to "one of a list of acts generally prohibited by treaty but occasionally prohibited by customary law, and . . . committed during an armed conflict . . . by a perpetrator linked to one side of the conflict." Fenrick, *supra* note 12, at 771. War crimes are understood to be that limited category of acts committed during armed conflict that are prohibited without reference to the status of a belligerent. *See* Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205, 214 (1977).

[20] *See* GEOFFREY BEST, WAR AND LAW SINCE 1945, at 182-84 (1994) (tracing earliest use of "war crimes" to Nuremberg).

[21] *See* Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 153 (noting that war crimes are "repulsive, heinous acts" and that "brutal acts of plunder, torture, rape, and murder that [IHL] forbid[s] . . . appall and offend all of humanity.").

[22] Explanatory theories posit that states comply with IHL in order to preserve their reputations, increase the potential for reciprocity, avoid reprisals and serve the interests of justice. HINGORANI, *supra* note 14, at 192-93 (enumerating hypotheses).

B. Frustration: Compliance Deficiencies

Incorporation of humanitarian principles—fundamentally moral conceptions—into law presents ontological problems, and thus has war proven recalcitrant to legal restraint: the non-derogable limitations IHL purports to impose[23] have been transcended throughout its entire developmental history.[24] Prior to World War II, IHL was enforceable only insofar as states possessed the political will to prosecute their own nationals,[25] and suppression of violations was left largely to an informal regime of reprisal.[26] The recent record of compliance is improving, yet still sparse.[27] Confronted by realist, just-war and behavioralist explanations for failures to restrain self-interested soldiers and states in combat,[28] IHL scholars,

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[23] Much of IHL has been constructed as absolute, unqualified prohibitions on conduct in war that do not permit derogation even *in extremis* and do not take into consideration the relative justice of the cause. *See* MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR 161 (1999) (stating that IHL "prohibit(s) [violations] unequivocally, in all circumstances and without exceptions"). The notion that the substantive content of IHL is the product of a universal consensus—the "general consent of mankind"—supplies the categorical imperative for such absolutism; WALZER, *supra* note 12, at 230 (noting that "the rules of war are a series of categorical and unqualified prohibitions . . . that . . . can never rightly be violated even in order to defeat aggression"). *See generally* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF ETHICS (Thomas Kingsmill Abbott trans., Longmans, Green & Co. 1955) (1873) (elaborating the absolute proscription of killing human beings in all circumstances). While the absolutist school has much to argue in its favor—namely clarity, consistency and the perception of moral superiority in the sense that the amelioration of the rigors of war may best be achieved by refusal to permit any derogations whatsoever lest loopholes become escape hatches for crafty but malevolent actors—some commentators suggest that the practical exigencies of actual military operations are such that absolutism may be ill-suited even to absolutist purposes. *See, e.g.*, WALZER, *supra* note 12, at 231 (suggesting an alternative, utilitarian doctrine "that stops just short of absolutism" and "might be summed up in the maxim: do justice unless the heavens are (really) about to fall"). Others simply reject the notion that IHL is akin to other species of law, contending instead that "[t]he law of war is different [from labor or environmental law] in that there are more gray areas than black and white." William Hays Parks, *The Law of War Adviser*, 18 MIL L. & L. WAR REV. 357, 385 (1979).

[24] *See* BEST, *supra* note 20, at 290-91 (characterizing the observance of IHL as "indifferent and lamentable"); *see also* OSIEL, *supra* note 23, at 162 (stating that "atrocious misconduct has been, if not a virtual constant, then at least persistent and perennial"); WALZER, *supra* note 12, at 232 (indicating that violations of IHL are routinely committed even by "morally serious" soldiers who are capable of differentiating right from wrong). As empirical evidence of the frequent violation of IHL, note the creation of judicial fora for the specific purpose, inter alia, of prosecuting violations of IHL that occurred in the former Yugoslavia and Rwanda in the 1990s. *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res.

827, U.N. SCOR, 48th Sess., 3217 mfg., U.N. Doc. S/RES/827 (1993).

[25] Obligations under IHL traditionally extended only so far as to the passage of domestic legislation and the domestic investigation and prosecution of offenses. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3317 (limiting international legal obligation of parties to the passage of the necessary domestic legislation to provide for effective punishment of offenders). Enforcement of IHL was left subject to affected states that, in many instances, ordered or tolerated systemic violations of IHL. HINGORANI, *supra* note 14, at 197. States loathe on political grounds to sanction their military personnel for executing state policies have been even less amenable to exposing themselves to embarrassment resulting from the extradition of individuals accused of violating IHL. BEST, *supra* note 20, at 396.

[26] *See* Solf & Cummings, *supra* note 19, at 205 (surveying modalities employed in the suppression of war crimes). For a definition and discussion of "reprisal," *see infra* note 134.

[27] Prior to the establishment of international criminal tribunals in the 1990s, the number of prosecutions of war criminals could be counted on the fingers of one's hands. *See* Christine van den Wyngaert, *The Suppression of War Crimes Under Additional Protocol I, in* HUMANITARIAN LAW OF ARMED CONFLICT, *supra* note 12, at 201 n.18 (reporting the paucity of prosecutions enforcing IHL between 1945 and 1988). In all likelihood, the majority of war crimes go unreported. *See* BEST, supra note 20, at 397 (opining that most war crimes go unnoticed, and "what they amount to as a proportion of those [that are reported] . . . defies calculation"). For a survey of various mechanisms employed or proposed to enhance enforcement of IHL, see Jamie Mayerfeld, *Who Shall be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25 HUM. RTS. Q. 93 (2003); see also Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 19-20, 30, 35, 38-40 (1995).

[28] Explanations for compliance deficiencies cluster in several camps. Legal realists contend that existing enforcement mechanisms offer inadequate support for IHL because international law generally, and IHL specifically, is structurally indisposed to the governance of state behavior in an anarchical system wherein power remains the primary currency and decisions with respect to the conduct of war are rendered with a view toward power maximization rather than adherence to law; where violation of IHL would maximize power, it is therefore optimal to do so and IHL is thus little more than the codification of abstract aspirations certain to be disappointed in practice. *See* KEEGAN, *supra* note 5, at 63 (summarizing realist pessimism regarding the malleability of the nature of the international system by noting that "[t]he most important limitations on warmaking . . . have always lain beyond the will or power of man to command"); HANS J.

MORGENTHAU, POLITICS AMONG NATIONS 279-314 (Hans J. Morgenthau & Kenneth W. Thompson eds., 5th ed. 1973) (expressing deep skepticism with regard to the capacity for law to trump power in international relations, in particular in the issue area of armed conflict); Raymond Aron, *The Anarchical Order of Power*, *in* CONDITIONS OF WORLD ORDER 25 (Stanley Hoffman ed., 1968) (describing the international system as an "anarchical order of power" where might equates with right and law is irrelevant). Some realist commentators contend that IHL itself contributes to the perpetuation of war by making it "more acceptable, more endurable." *See* FRITS KALSHOVEN, BELLIGERENT REPRISAL (1991) (suggesting that rather than limit the methods and means of war, those who would make the phenomenon more rare ought to delegalize international conflict to the point that they become "unbearable beyond endurance" and therefore less rational as a policy instrument). Law and economics realists reject the assumption that IHL is governed by a desire to humanize war and suggest to the contrary that laws of war are merely "devices for limiting the efficiency of military technology" and thereby equalizing power disparities between the powerful and the weak; as such, it is not in the interest for the powerful to consent to or comply with it. Eric Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003).

Another school of IHL skeptics, just war theorists, argue that states fighting in a just cause, defined generally as a war initiated by legitimate authority for the sole purpose of checking unjust aggression, are obligated to derogate from the positive laws of war to the extent necessary to triumph over unjust adversaries. *See* Aron, *supra*, at 27-52. In effect, the justice of the cause sanctions and even necessitates violations of IHL, and moderation in the struggle against terrorists and rogue states is therefore vice rather than virtue. *See* FRANCISCO DE VITORIA, *On the Law of War*, *in* POLITICAL WRITINGS 295-305 (Anthony Pagden & Jeremy Lawrence eds., 1991) (suggesting that the highest form of morality when threatened by transcendent evil is not adherence to legal regulation, but victory). Just war theory is considerably more complex than herein presented. For a detailed discussion, see generally WALZER, *supra* note 12.

In turn, behavioral theorists fix upon the tension between the rational self-interest of combatants and the self-abnegation demanded of them by an oft-irrational and incoherent legal regime promulgated without reference to any broad theory of human behavior in combat. For behavioralists, it is axiomatic that when confronted by a choice between self-preservation and violation of IHL, many "[o]therwise law-abiding individuals will commit crimes in order to save their own lives; national governments will likewise break treaties and international rules, if necessary, for their own preservation." TAYLOR, *supra* note 13, at 33; WALZER, *supra* note 12, at 14-15 ("The moral theorist . . . must come to grips with the fact that his rules are often violated or ignored . . . [because] to men at war, [these] rules often don't seem relevant to the extremity of their situation."). Behavioralists also seize upon the propensity for soldiers to exhibit irrational responses to the stressors of combat and, in so doing, to transcend the rules of IHL. OSIEL, *supra* note 23, at 162 (suggesting that the "frenzy of combat elicits primordial passions that are nearly impossible to restrain," such as a "soldier's sudden impulse to avenge a close comrade who was killed, perhaps through an enemy's act of deception"). Empirical data supports the premise that compliance with IHL is a function of its conformity to the normative conventions and practiby the 1980s, were lamenting a regime shrinking to the "vanishing point" of international law.[29]

C. Formalization: The International Criminal Court

Despite its history, IHL has been resurrected by the post-Cold War passion of its proponents. Freed of the restraints of bipolar paralysis,[30] dedicated to the suppression of war

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cal necessities of soldiers. *Id.* at 31-32 (identifying "widespread disregard" for restrictive rules of engagement that enhanced the threat to United States ground forces during the Vietnam War as foundation for the assertion that "[i]t has since become an article of faith among U.S. officers that these rules placed American forces in undue danger and were therefore tactically imprudent (and morally indefensible)"); Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 5 (1994) (asserting that, rather than cleave closely to external legal constraints, "when the shooting starts, soldiers follow those principles that . . . potent experiences have etched into their minds . . . [and that] conform both to tactical wisdom and to *relevant* legal constraints on the use of force" (emphasis added)). By failing to incorporate exceptions for soldiers' instincts and passions, the absolutist regime of IHL has charted an irrational course toward the rocky shoals of human nature. *See* BEST, *supra* note 20, at 291 (stating that the "whole IHL enterprise is objectively paradoxical and . . . far-fetched: war on the one hand, human nature on the other"); WALZER, *supra* note 12, at 47 (conceding the facial irrationality and "alien"-ness of much of IHL in relation to the experience of soldiers); Richard Wasserstrom, *The Responsibility of the Individual for War Crimes*, *in* PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS 47, 60 (Virginia Held et al. eds., 1974) (contending that "the laws of war are not a rational, coherent scheme of rules and principles. Were there an intelligible rationale to the laws of war, . . . the soldier [could] attempt to determine which of his actions were war crimes and which were not."). In short, for behavioralists, an absolute obligation to self-sacrifice is at odds with the instinct to self-preservation, and IHL is "a bunch of rules made up by lawyers who sit behind a desk, rather than by real soldiers who have felt the sting of battle." Morris, *supra* note 11, at 4.

[29] H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT Y.B. INT'L L. 360, 382 (1952) ("[I]f international law is, in some ways, at the vanishing point of law, the law of war is . . . at the vanishing point of international law."). In 1986 the International Conference of the Red Cross (ICRC) lamented the "disturbing decline in respect for [IHL]." Respect for International Humanitarian Law in Armed Conflicts and Action by the ICRC for Persons Protected by the Geneva Conventions, ICRC Res. 1 (1986).

[30] *See* Eric L. Chase, *Fifty Years After Nuremberg: The United States Must Take the Lead in Reviving and Fulfilling the Promise*, 6 USAFA J. LEG. STUD. 177, 182 (1995-96) (attributing ineffective enforcement of IHL post World War II—a "betrayal" and an assault on the Nuremberg process—in large measure to Soviet machinations in the U.N. Security Council that privileged political objectives at the expense of justice).

crimes as part of a human rights agenda[31] and convinced that the path to this goal ran ineluctably through law, the torrent of globalization was steered toward the establishment of the first permanent tribunal[32] with universal jurisdiction to punish serious violations of IHL by individuals.[33] Despite a contentious drafting histoprocess,[34] state after state acceded to the Rome Statute,[35] and the International Criminal Court

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[31] Advocates of IHL concentrate their labors on ensuring that states investigate and prosecute, or extradite, their own nationals for violations of IHL. Philippe Kirsch, *Introduction* to REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 9 (Herman A.M. von Hebel et al. eds., 1999) [hereinafter REFLECTIONS]. Enhancing universal respect for, and compliance with, human rights law as a regime independent from political considerations is the ultimate objective. BEST, *supra* note 20, at 399-400 (stating that a fundamental objective of IHL advocacy is the creation of supranational institutions with the "authority and power so universally effective and irresistible that no national or regional interest will be able to thwart . . . the principles of the law").

[32] *See* Rome Statute of the International Criminal Court, July 17, 1998, art. 1, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute] (establishing the ICC as a "permanent institution"). The subject of a permanent international criminal court was first visited in the aftermath of World War I when, in 1920, the League of Nations appointed an Advisory Committee of Jurists to examine a High Court of International Justice with jurisdiction "to try crimes against international public order and the universal law of nations." Herman von Hebel, *An International Criminal Court—A Historical Perspective*, *in* REFLECTIONS, *supra* note 31, at 16-17. Although a commission was appointed by the Allies to prepare the prosecution of Kaiser Wilhelm II and other German defendants for war crimes related to the invasion of neutral Belgium, unrestricted submarine warfare and extrajudicial killing of POWs, the proposed High Court did not come to pass. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,* 14 AM. J. INT'L L. 95, 117 (1920). In 1943 the U.N. War Crimes Commission was established to prepare the trial of Axis war criminals and, on August 8, 1945, the Allies created the Charter of the International Military Tribunal. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 27 [hereinafter Charter of the IMT]. Allied Control Council Law Number 10 of December 20, 1945, granted jurisdiction to the IMT to try Nazi defendants charged with crimes against peace, war crimes and crimes against humanity, and the first judgment was rendered in October 1946. von Hebel, *supra* note 32, at 19-21. However, the IMT mandate was terminated after the Nuremberg trials and, although in 1981 the United Nations General Assembly authorized the International Law Commission to codify international crimes as a precursor to a permanent international criminal court, the subject, as a practical matter, lay dormant for decades. *Id.* at 24-25; *see also* S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg., ¶ 13, U.N. Doc. S/RES/670 (1990) (suggesting that criminal liability for violations of IHL with respect to the Iraqi invasion of Kuwait would attach to individuals but demanding no specific enforcement); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991); S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg., U.N. Doc. S/RES/686 (1991) (opting to confine criminal responsibility for violations of IHL to

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states).

In 1993 and 1994, the U.N. Security Council, acting under Chapter VII of the Charter to Restore International Peace and Security, created ad hoc tribunals with jurisdiction to punish individuals for violations of IHL occurring in the territory of the former Yugoslavia and Rwanda. *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/25704 (1993) [hereinafter ICTY]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR]. Champions of international criminal tribunals "rejoice[d] that [for the first time] . . . a person suspected of [violations of IHL] may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming . . . from all continents of the world." Prosecutor v. Tadic, 1995 I.C.T.Y. IT-94-1-AR72, ¶ 62 (Oct. 2) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

[33] *See* Rome Statute, *supra* note 32, art. 25 (providing for criminal responsibility for commission of crimes within ICC jurisdiction whether committed "as an individual, jointly with another or through another person"). Although individual criminal responsibility for violations of IHL was arguably a principle of customary international law prior to World War II, the ICC is the first permanent international tribunal with a statutory basis for jurisdiction over individual criminal defendants.

[34] The Rome Conference commenced on June 15, 1998, and five weeks of intense negotiations ensued during which a "Like-Minded Group" of over eighty militarily weak states, committed to a powerful court and supported by an array of NGOs such as Human Rights Watch and the ICRC, emerged in opposition to a "Third Group of States," led by the United States and other members of the Security Council who were concerned about the potential for a court with overbroad jurisdiction. Kirsch, *supra* note 31, at 2-3. Multiple United States jurisdictional amendments that would have limited prospective jurisdiction were defeated. *See* Mahnoush H. Arsanjani, *Reflections on the Jurisdiction and Trigger-Mechanism of the International Criminal Court*, *in* REFLECTIONS, *supra* note 31, at 60 (describing defeat of United States jurisdictional amendment requiring consent of state of nationality of accused); Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute,* 49 DUKE L.J. 825, 832 (1999) (describing overwhelming defeat of joint United States-Indian jurisdictional amendment that would have permitted the state of nationality to declare that its accused national committed the crime in pursuit of official duties and thereby prevented the ICC from exercising jurisdiction in the absence of a Security Council referral). Although a Third Group succeeded in amending ICC jurisdiction to permit a seven-year exemption from war crimes, the tide of United States influence was forced back by a consortium of Like-Minded states and NGOs.

[35] The Rome Statute was adopted by a non-recorded vote of 120 in favor,

(ICC), hailed as a triumph of international civil society over statist impunity[36] certain to bring the worst violators to brook,[37] entered into force in July 2002.[38] However, longstanding United States rejectionism[39] manifested in heated objections.

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seven against, and four abstentions on July 17, 1998. *See* Press Release, United Nations, Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court (July 17, 1998), *at* http://www.un.org/icc/pressrel/lrom22.htm. The United States, Iraq, Libya, Sudan, Yemen, China and Israel voted against. Anne-Marie Slaughter, *Memoriaum to the President*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT? 7 (Alton Frye ed., 1999).

[36] The signing of the Rome Statute in July 1998 was heralded as a long-awaited milestone in the progressive erosion of the consent-based system of state sovereignty. In the ICC, proponents see a future wherein states will ensure that violators of IHL are prosecuted or extradited and the enforcement of IHL will deter would-be transgressors, leading ultimately to greater peace. Kirsch, *supra* note 31, at 9.

[37] Article 5 of the Rome Statute provides that the ICC has jurisdiction only over "the most serious crimes of concern to the international community as a whole." *See* Rome Statute, *supra* note 32, art. 5. Moreover, ICC jurisdiction is limited to cases arising out of armed conflict and does not reach acts committed during "isolated and sporadic acts of violence." *Id.* art. 8(2)(d). The Rome Statute thus does not formally criminalize all violations of human rights but rather is addressed exclusively to serious violations of IHL. *See* Meron, *Humanization*, *supra* note 12, at 265. Accordingly, Articles 6-8 create jurisdiction solely over genocide and specifically enumerated lists of crimes against humanity and serious war crimes. Rome Statute, *supra* note 32, arts. 6-8.

[38] Article 126 provides that the ICC would come into existence sixty days after the sixtieth ratification and thus the statute entered into force on July 1, 2002. *See* United Nations Treaty Collection, Rome Statute of the International Court, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (listing ratifications). For a discussion of the structure of the ICC, see generally Robert Cryer, *Commentary on the Rome Statute for an International Criminal Court: A Cadenza for the Song of Those Who Died in Vain?*, 3 J. ARMED CONFLICT L. 271 (1998).

[39] During the early 1990s, Congress produced aspirational language supporting an international criminal court. *See, e.g.*, 103 H.R.J. Res. 89, 105th Cong. (1997) (calling on the President to "continue to support and fully participate in negotiations . . . to . . . establish an international criminal court"). The Ambassador-at-Large for War Crimes Issues, David Scheffer, indicated a firm executive commitment to implementing this "sense of Congress." Foreign Relations Nominations: Congressional Testimony Before the U.S. Senate Comm. on Foreign Relations, Federal Document Clearing House, July 15, 1997. However, determined legislative hostility to the ICC had manifested as early as 1994. *See* 140 CONG. REC. S96, 100 (daily ed. Jan. 26, 1994) (offering Amendment No. 1254, proposed by Senator Jesse Helms, to the Department of State Authorization Act of 1994 which, although tabled, stated as its purpose "to strike all language . . . relating to sup-

D. *Rejection: The United States—Sole Indispensable Nation—Actively Opposes the ICC*

1. Arguments for Public Consumption: Sovereignty, Accountability, Legitimacy

United States critics prophesied that, rather than administering universal justice, "rogue" prosecutors and states parties,[40] eager to circumscribe United States hegemony, would

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port for an international criminal court"). As international momentum in support of the ICC developed in 1998, Senator Helms pronounced the ICC Treaty "dead on arrival" at the Senate Foreign Relations Committee if the United States did not retain the power to veto an indictment. *See* Cong. Press Release, Helms Declares U.N. Criminal Court "Dead-on-Arrival" in Senate Without U.S. Veto (Mar. 26, 1998). Helms further advised that the creation of "any permanent judiciary within the U.N. system would be totally inappropriate, insomuch as . . . it would grant the U.N. a principal trapping of sovereignty." *Id.* Many legislators joined in the characterization of the ICC as a "monster that must be slain." *See* Jesse Helms, *Personal View: Slay This Monster*, FIN. TIMES, July 30, 1998, at 12. Subsequent to promulgation of the Rome Statute, congressional Republicans developed a four-point action plan: 1) withdrawal of United States troops from any state ratifying the ICC, 2) veto any Security Council referral to the ICC, 3) withholding of funds to the ICC and 4) revision of Status of Forces Agreements to preclude extradition of United States military personnel to the ICC. Symposium, *Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime*, 21 MICH. J. INT'L L. 655, 754 (2000) [hereinafter Symposium]. Congressional Democrats have introduced legislation supporting the ICC, but none of their proposals have enjoyed significant support. *See* American Citizen's Protection and War Criminal Prosecution Act of 2001, S. 1296, 107th Cong. (2001) (introduced by Sen. Christopher Dodd, a Democrat from Connecticut, on August 1, 2001); H.R. 2699, 107th Cong. (2001) (introduced by Rep. William Delahunt, a Democrat from Massachusetts, on August 2, 2001). Executive opposition has found expression in statements from senior Department of Defense officials who, in measured fashion, have sought to limit the criminal exposure of United States military personnel. *See* Department of Defense News Briefing, American Forces Press Service, Remarks at NATO Headquarters, Brussels, Belgium (June 11, 1998) (expressing, in a statement by Defense Secretary William Cohen, concerns that the ICC would compromise United States interests in providing "one hundred percent protection" to its forces serving overseas); *see also* Department of Defense News Briefing (Sept. 14, 2000) [hereinafter DOD Briefing] ("We still don't think that the ICC in its current configuration is the right thing for the United States to sign on to.").

[40] *See* Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 357 (1999) (conceding possibilities for politicization of ICC by a "rogue prosecutor[]"); Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 200 (2001) (stating that a

prosecute members of the United States Armed Forces[41] for acts not widely recognized as violations of customary IHL,[42]

"politicized ICC . . . could become a sort of human rights advocate, responsive to any and all complaints regardless of the source or seriousness of the allegations"). The election of Luis Moreno Ocampo, prosecutor of Latin American military personnel in highly politicized contexts, as first Chief Prosecutor, is unlikely to allay such concerns. *Moreno Ocampo Named ICC Chief Prosecutor*, HARVARD UNIVERSITY GAZETTE, Apr. 24, 2003, at 8.

[41] Concerns abound that the ICC might be pressed into service to check United States influence through the malicious prosecutions of United States military personnel by states parties jealous of United States wealth and power. *See, e.g.*, Robert Kagan, *Europeans Courting International Disaster*, WASH. POST, June 30, 2002, at B7 (suggesting that, as the "dominant economic . . . and military force," the United States is particularly vulnerable to the machinations of weaker states that would manipulate the ICC to bring unfounded criminal charges against United States military forces to neutralize United States power); Marler, *supra* note 34, at 833 (noting United States and French concerns about potential for politically-motivated prosecutions); Madeleine Morris, *Universal Jurisdiction in a Divided World*, 35 NEW ENG. L. REV. 337, 338 (2001) (describing politically motivated prosecution as a weapon in waging interstate quarrels); Bill Newill, *Legal Scholars Issue Principles on War Crimes*, RECORD (Bergen County, N.J.), July 23, 2001, at A3 (quoting Cherif Bassiouni, principal drafter of Rome Statute, as conceding the "very real possibility" of political ICC prosecutions). Experience raises the question of whether adjudication of violations of IHL is invariably a political exercise. WELLS, *supra* note 12, at 119 (noting that many legal scholars believe World War II tribunals lacked any basis in IHL because no precedent existed declaring conspiracy to wage aggressive war a crime, "following orders" was a permissible defense and law was applied ex post facto); The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley & the Centre for Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 107 (2000) [hereinafter Human Rights Center & Centre for Human Rights] (claiming ICTY is "plagued by a crisis of legitimacy"). *See generally* Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111 (2003) (warning against dangers of overreach of domestic courts applying universal jurisdiction to reach extraterritorial violations of IHL). Moreover, concerns about politicization extend to the judges. Darin R. Bartram & David B. Rivkin, Jr., *The ICC's First False Step*, WALL ST. J., Feb. 17, 2003, at 18. The eighteen ICC judges enjoy broad powers but are without general guidance on the legal principles that will inform their decisions and are not directly accountable to states. Colin Warbrick, *International Criminal Courts and Fair Trial*, 3 J. ARMED CONFLICT L. 45, 45 (1998). *But cf.* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 284 (2003) (suggesting states exercise significant control over international judicial bodies).

[42] International law consists of treaty-based as well as customary sources of law. *See* Statute of the International Court of Justice, art. 38, 59 Stat. 1055

(1945) (enumerating sources of international law as treaties, custom, general principles and the opinions of expert commentators). Customary international law (CIL) evolves from the practice of states consistent with the subjective understanding that such practice is legally obligatory. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 4 (Feb. 20). State practice, particularly by directly affected states, is the most concrete element. Michael Akenhurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 18, 18 (1977). To become binding, the practice must be consistent, settled and uniform. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 433 (1983). The progressive development of IHL has proceeded largely by codification of the customs of soldiers. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 2 (1996). It is universally accepted that the foundational principles of IHL are necessity, proportionality and distinction. Still, it is arguable that much of the substantive content of the more hortatory declarations and conventions has not yet passed into the corpus of customary IHL. The substantive provisions of military manuals vary widely from one state to another, suggesting the absence of a body of custom widely accepted by states. Although the ICJ has specifically addressed the question of the requisite degree of consistent practice necessary to constitute custom, determining that it need not be universal, no authoritative judicial pronouncement exists to delineate the precise boundaries of customary IHL. *See* Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14, 98 (June 27) ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."). Moreover, nearly all states are members of IHL treaties; there are no non-parties to whom one can refer to determine whether customary IHL obligations are operative. *See North Sea Continental Shelf*, 1969 I.C.J. at 5 (stating that, although little support for the customary legal basis of a norm may be found in the conduct of state parties where state parties follow a practice solely in accord with treaty obligations, if non-parties are doing so it is likely the result of a customary obligation); Meron, *Humanization*, *supra* note 12, at 247 (noting that, although the legal obligations of IHL treaties were once limited to parties, the crystallization of the substance of those treaties as customary IHL, and the accession of almost all states to those treaties has rendered moot questions as to the applicability of such treaties as between non-parties). Furthermore, even manuals of legally sophisticated states do not identify provisions of various IHL conventions they believe declaratory of custom. KWAKWA, *supra* note 3, at 24-32. Worse, few studies pointedly address the formation of customary IHL, nor do various international judicial decisions discuss the process by which conventional norms are transformed into CIL. As a result, the substantive boundaries of customary IHL are subject to constant contestation. *See* Du Preez v. Truth and Reconciliation Comm'n, 1997 (3) SALR 204, 233 (A) ("Selecting what is and what is not part of custom is . . . fraught with political considerations."); Stuart Walters Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 148 (2000) (indicating that the determination and application of customary norms of IHL is a contested process). Human rights advocates insist that the expanding body of norms and principles articulated since the late 1970s constitutes a body of CIL directly applicable to the battlefield. Most states, however, have elected to incorporate, in criminal codes and military manuals, only especially the blurry, unsedimented principles of necessity,[43]

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those rules and principles for which there is evidence of widespread state practice. Meron, *Humanization*, *supra* note 12, at 247 (suggesting that human rights groups take an "idealistic" position with regard to customary IHL that even otherwise sympathetic experts find "problematic"). Some commentators restrict customary IHL further, stating that it is official statements that delineate the scope and force of legal obligation. R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT Y.B. INT'L L. 275, 300 (1965-66) (stating that the "firm statement by the State of what it considers to be the rule [of customary IHL] is far better evidence of its position than what can be pieced together from [its] actions . . . in a variety of contexts"); *cf.* Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 472 (Dec. 20) (holding that official declarations of CIL can legally obligate a state). In short, the content of customary IHL is nebulous and insufficiently articulated so as to give notice. *See* PAUL CHRISTOPHER, THE ETHICS OF WAR AND PEACE 167 (1994) (noting that the lack of clarity as to the content of customary IHL makes it "virtually impossible . . . for soldiers to know with any surety whether certain orders they might receive are lawful or not"). The Rome Statute restates rules and principles of IHL as sources of law. *See* Rome Statute, *supra* note 32, art. 21(1) (providing that primary sources of applicable law are the "Elements of Crimes and its Rules of Procedure and Evidence" and "applicable treaties and the principles . . . of the international law of armed conflict"). Despite the amorphousness of custom-based IHL, Article 21 endows the ICC with competence to pronounce the "principles of the international law of armed conflict." *Id.* Moreover, although Article 9 purports to establish a textual basis for specific elements, amendment of the Statute could enable a two-thirds majority of states parties to define new crimes without reference to practice, and further provides that enumerated elements are not dispositive but merely intended to "assist" the ICC in its "interpretation" of Articles 6-8. *Id.* art. 9(1). By arogating to itself the power to define custom, the ICC may displace state sovereignty. Adriaan Bos, *The International Criminal Court: Recent Developments, in* REFLECTIONS, *supra* note 31, at 43 (stating that the Rome Statute "must prevail [in a conflict with domestic law]"). Due to this open grant to redefine customary IHL, the United States is unwilling to subject its armed forces to ICC jurisdiction.

[43] The overwhelming bulk of death and destruction incident to war is governed not by positive IHL but rather by "military necessity," the slipperiest, most elastic concept in the IHL canon. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 219 (1998). Traditionally, the customary IHL principle of necessity implicitly authorized all operations undertaken in the immediate interest of self-preservation, provided a minimal threshold requirement—that they be intended and tended directly toward the military defeat of the enemy—was satisfied. ROGERS, *supra* note 42, at 5 (defining military necessity as "the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for . . . the complete submission of the enemy"). However, by World War II the range of actions considered permissible by necessity had narrowed. *See The Krupp Trial*, *in* 10 UN WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 138-39 (William S. Hein & Co. 1997) (1948) (retreating from the general authorization of military operations by reference to military

proportionality[44] and distinction.[45] By unjustifiably increas-

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necessity in holding that "[t]o claim that [IHL] can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws . . . of war entirely"); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter THE LAW OF LAND WARFARE (1956)] (defining military necessity as "that principle which justifies those measures *not forbidden by international law* which are indispensable for securing the complete submission of the enemy as soon as possible" (emphasis added)); *The German High Command Trial*, *in* 12 UN WAR CRIMES COMM'N, *supra*, at 93 (holding that if necessity constituted general authorization for all belligerent acts it "would eliminate all humanity and decency and all law from the conduct of war and it is a contention which [the] Tribunal repudiates as contrary to the accepted usage of civilized nations"); *The Hostage Case*, *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1255-56 (1950) [hereinafter *The Hostage Case*] ("Military necessity or expediency do not justify a violation of positive rules. [IHL] is prohibitive law."); William V. O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605, 616 (1972) (stating that military necessity "consists in all measures . . . indispensable and proportionate to a legitimate military end, *provided that they are not prohibited by the laws of war or the natural law*" (emphasis added)). An uneasy compromise exists between the prohibitionism of IHL regulators and the pragmatism of soldiers. Henry Shue & David Wippman, *Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions,* 35 CORNELL INT'L L.J. 559, 559 (2002). Many commentators have doubts as to the continued applicability of the principle. *See* WALZER, *supra* note 12, at 5-8 (criticizing Athenian justification for killing the entire male population of Melos during Peloponnesian Wars on ground that to fail to do so would have inspired resistance elsewhere); Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64 SASK. L. REV. 347, 395 n.166 (2001) (rejecting necessity as justification for Allied bombing of Dresden). For others, the proscription of so much conduct heretofore permissible has drained necessity of operational significance. ROGERS, *supra* note 42, at 3. To still others, determination of necessity is a balancing test that weighs the value of the legitimate objective against the suffering caused in its attainment; it is essentially a proxy for proportionality. J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069, 1070 (2002). Despite theoretical disagreements, necessity, though it does not have a general suspensory effect on IHL, may yet be invoked in "exceptional circumstances . . . in regard to acts otherwise prohibited." N.C.H. Dunbar, *Military Necessity in War Crimes Trials*, 29 BRIT. Y.B. INT'L L. 442, 442 (1952). The validity of a defense is fact-intensive and tribunals called to render judgments accord a margin of appreciation to soldiers in recognition of imperfect knowledge of the facts of the battlefields. *See* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 147-50 (1990); PRZETACZNIK, *supra* note 11, at 289-306 (stating that, although many battlefield actions are "presumptively illegal," the sole circumstance under which necessity is inapplicable as a defense is where the method employed was illegal per se).

[44] The customary principle of "proportionality," which derives from the Mosaic

ing the criminal exposure of United States forces engaged in thankless humanitarian operations with which the world bailiff has selflessly saddled itself,[46] a politicized ICC with a

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Lex Talionis, prescribing that an injury should be requited reciprocally but not with greater injury, dictates that military force not be employed to cause damage "excessive in relation to the concrete and direct military advantage anticipated." HENRY SIDGWICK, THE ELEMENTS OF POLITICS 254 (1919); R.R. Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165, 178-79 (1978) (defining proportionality as the requirement that civilian losses be balanced against military advantage); *Exodus* 21:23-25 (stating "[an] eye for [an] eye, [a] tooth for [a] tooth"). "Proportionality," however, is as elusive as necessity: it is difficult to assess whether the method and means are in fact "conducive" to the end sought and not excessive in relation to that end. *See* WALZER, *supra* note 12, at 129 ("[T]here is no ready way to establish an independent or stable view of the values against which the destruction . . . is to be measured.").

[45] The customary IHL principle of "distinction," which maintains that the only legitimate object of war is to destroy enemy armed forces, imposes a strict prohibition against the deliberate targeting of noncombatant personnel and civilian targets. *See* Christopher C. Burris, *Re-Examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. INT'L L. & COM. REG. 943, 966 (1997) (discussing origins and application of principle of distinction). Not all scholars concur with the assumption that noncombatants bear no responsibility for war and as a consequence should be spared its direct effects. *See, e.g.*, PAUL FUSSELL, *Thank God for the Atom Bomb*, *in* THANK GOD FOR THE ATOM BOMB AND OTHER ESSAYS 13 (1988) ("The intelligence officer of the U.S. Fifth Air Force declared on July 21, 1945, that 'the entire population of Japan is a proper military target,' and he added emphatically, '*There are no civilians in Japan.*'"); GEORGE ORWELL, *As I Please*, *in* 3 COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL, 150, 151-52 (Sonia Orwell & Ian Angus eds., 1968) (suggesting that the bombing of civilian targets in World War II "shattered the immunity of civilians, one of the things that have made war possible," and in so doing reduced the likelihood of future war); MAO TSE-TUNG, ON GUERRILLA WARFARE 73 (Samuel B. Griffith trans., 1961) (postulating that during an insurgency all adults become combatants). Other commentators insist that distinction rests upon reciprocity. *See* PAUL RAMSEY, THE JUST WAR 435-36 (1983) (contending that low-intensity conflicts by their very nature "enlarg[e] the area of civilian death and damage that is legitimately collateral"); Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 464 (2002) (examining argument that deviation of one party from the duty to distinguish combatants from noncombatants releases the other). Still others propound a "supreme emergency" exception whereby civilians may be attacked if state survival demands it. JOHN RAWLS, THE LAW OF PEOPLES 98 (1999). In practice, arguments about distinction center not upon whether civilians may be deliberately targeted, but rather whether targeting decisions that cause unintended civilian casualties are illegal.

[46] That the only state routinely willing and able to liberate the oppressed peoples of the world should endure criminal exposure when so doing is offensive

mandate to remake IHL[47] would induce isolationism.[48] United States opponents further opined that, despite textual deference to complementarity,[49] the ICC would subvert United

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to ICC critics. *See* Senator Helms Before the U.N. Security Council (Jan. 19, 2000) ("[W]hen the oppressed peoples of the world cry out for help, the free peoples . . . have a fundamental right to respond."). Humanitarian intervention is, however, the scenario feared most likely to trigger ICC prosecution of United States nationals. Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 4-5 (2002).

[47] *See, e.g.*, John Bolton, *Speech Two: Reject and Oppose the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT?, *supra* note 35, at 39-40 (opining that the ICC will become a forum for declaring "spontaneous customary [IHL]" at variance with traditional understandings); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 34 (2001) (expressing belief that the relative paucity of precedent for judicial enforcement of IHL will permit the ICC to exploit definitional uncertainties and reach interpretations that criminalize erstwhile legitimate conduct).

[48] *See* William Safire, *Enter the Globocourt*, N.Y. TIMES, June 20, 2002, at A25 ("[T]he lack of any effective mechanism to prevent politicized prosecutions of United States service members . . . could create a powerful disincentive for U.S. military engagement in the world." (quoting United States Secretary of Defense Donald Rumsfeld)). Critics of the ICC, which is silent as to the legality of humanitarian intervention, suggest that the effects will be most pronounced in the area of "optional" military engagements in which the United States is more invested than any other state. *See* Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court*, 17 AM. U. INT'L L. REV. 35, 44-45 (2001) (positing that the prospect of political prosecution of United States forces engaged in such operations will depress United States participation); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 19 (1999) (contending that a politicized ICC will "limit severely those . . . controversial . . . interventions that the advocates of human rights . . . so desperately seek from the United States"); Smidt, *supra* note 40, at 197 (judging the possibility for politically motivated prosecutions as "so high . . . that the United States forces most likely to . . . prevent . . . humanitarian violations may actually be deterred from responding"); Christopher M. Van de Kieft, Note, *Uncertain Risk: The United States Military and the International Criminal Court*, 23 CARDOZO L. REV. 2325, 2340 (2002) (suggesting politically motivated ICTY war crimes investigation of NATO Kosovo campaign will deter future interventions).

[49] States are obligated to either extradite suspects accused of crimes giving rise to universal jurisdiction to a requesting state or to try them domestically. M CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3 (1995). The principle of "complementarity" transposes this principle and provides that an international tribunal may exercise jurisdiction only where the state that would normally do so

States jurisdiction,[50] trump United States sovereignty[51] and

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on a territorial, nationality or other basis is unwilling or unable. Kirsch, *supra* note 31, at 4-5. The Rome Statute incorporates complementarity. Rome Statute, *supra* note 32, art. 17(1)(a)-(b) (determining a case to be inadmissible where it is "being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution," or where the case "has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute . . . unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute").

[50] The Rome Statute obligates the ICC to defer to a state decision not to prosecute, as well as to a domestic acquittal, provided that neither is "for the purpose of shielding the person concerned from criminal responsibility." *Id.* arts. 17(2), 20(3). United States concerns center upon whether the ICC would defer to a decision, based on factual sufficiency, prudential considerations or other good faith grounds, not to prosecute. *See* Gurule, *supra* note 46, at 8-9 (noting debate over whether ICC should intervene only when state proceedings were a "sham . . . intended to shield the perpetrator" or more generally to "correct a perceived miscarriage of justice"). Domestic critics envisage an activist ICC arrogating jurisdiction to create a peremptory, rather than complementary, body that sets aside national adjudications with which it disagrees. By this view, the ICC is, at best, redundant. *See* Department of Defense News Briefing (Sept. 14, 2000) (stating that the United States has a "stable judicial system . . . fully capable of" prosecuting "all allegations of misconduct by U.S. service members"). Exacerbating these concerns is uncertainty as to whether the ICC will permit a state to refuse "disclosure of evidence which relates to its national security." Rome Statute, *supra* note 32, art. 93(4). Under United States law, judges are deferential toward assertions of the state secrets privilege. *See* Halkin v. Helms, 690 F.2d 977, 985 (D.C. Cir. 1982) (denying motion to compel disclosure of information claimed privileged by CIA Director). Some people question whether the ICC will be as deferential. Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 139-40 (2002).

[51] The ICC may exercise jurisdiction over crimes committed by nationals of states parties *as well as* crimes committed on the territory of a member state. Rome Statute, *supra* note 32, art. 12(2). Further, exercise of territorial jurisdiction, permits the ICC to prosecute nationals of states that have not consented to its jurisdiction, provided the territorial state accepts ad hoc jurisdiction in the case in question. *Id.* art. 12(3). Moreover, the Security Council may make a referral as to whether or not the state of nationality or territory is a party, thereby creating jurisdiction over the nationals of every state. Rome Statute, *supra* note 32, art. 13(b). Similarly, the ICC prosecutor may initiate investigation *proprio motu* of all persons alleged to have committed crimes on the territory of member states. Rome Statute, *supra* note 32, arts. 12(3), 13(b), 15. According to critics, the ICC, even in concert with the Security Council, cannot trump the lack of United States consent to jurisdiction over its nationals. Morris, *supra* note 47, at 64. Still, as written, Articles 12-15 would permit, for example, Iraq to invoke ICC jurisdiction for alleged crimes committed by United States troops in Iraq while the ICC would be unable to "prosecute Saddam for massacring his own people." U.S. Dep't of State, Daily Press Briefing (July 20, 1998). The United States, ob-

vitiate the procedural rights of United States defendants.[52]

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jecting to the jurisdictional breadth of the Rome Statute, unsuccessfully proposed amendments that would have required the state of nationality of the accused to consent to jurisdiction or, in the alternative, barred the ICC from asserting jurisdiction over crimes in any conflict of which the Security Council was seized. ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 256 (1998).

[52] International criminal tribunals must provide minimum procedural protections to defendants. International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, art. 14(3), S. Exec. Doc. E, 95-2, at 26 (1978), 999 U.N.T.S. 171, 177; *The Justice Trial*, *in* 6 UN WAR CRIMES COMM'N , *supra* note 43, at 103. The Rome Statute incorporates extensive safeguards: defendants may not be charged with ex post facto crimes (Article 22) or for conduct committed prior to entry into force (Article 24); may not be placed in double jeopardy (Article 20); are presumed innocent (Article 66(1); are entitled to a statement of charges (Article 61(3)), counsel of choice (Article 67(1)(b), (d)), speedy and public trials (Article 67(1)(a), (c)), examine adverse witnesses (Article 67(1)(e), remain silent "without such silence being a consideration in the determination of guilt" (Article 67(1)(g); may not be tried in absentia (Article 63); are entitled to the exclusion of illegally obtained evidence (Article 69(7)); cannot be compelled to self-incriminate (Article 55(1)(a)) and are entitled to appeal guilty verdicts as well as sentences (Article 81). However, predecessor tribunals have a mixed record in implementing such rights. *See* Human Rights Center & Centre for Human Rights, *supra* note 41, at 103-04 (criticizing ICTY for murky procedural and evidentiary rulings, politicized case selection and lengthy detentions and trials). International trial judges have assumed wide latitude in drafting and amending rules of procedure and evidence, in effect claiming a legislative role. *See* Prosecutor v. Blaskic, 1998 I.C.T.Y. IT-95-14-AR-108 (Jan. 21) (Appeal of Judgment) (stating "it is the judge who finally takes a decision on the weight to ascribe to [evidence]. The [ICTY] is . . . a sui generis institution with its own rules of procedure . . . ."). The interpretation of evidentiary and procedural rules by predecessor tribunals has resulted in decisions, inconsistent with United States conceptions, to admit hearsay. *Id.* para. 7, 16, 17 (rejecting "blanket prohibition" on hearsay). That the broad interpretive powers available to the ICC might be exercised to deprive defendants of protections inherent in the United States legal system is of concern. Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391, 409-10 (2001-02). ICC defenders insist that international criminal proceedings are autonomous from domestic process. Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 91 (1999) (querying "whether . . . U.S. constitutional standards must be adopted by the rest of the world, or whether generally accepted principles of just treatment will not . . . promote a greater respect for [IHL]"). Nonetheless, as a matter of domestic law, United States citizens are entitled to the full protections of the Constitution, including the right to trial by jury, even when tried outside the United States. *See* Reid v. Covert, 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad,

Critics railed further at a lack of U.N. Security Council oversight they deemed essential to ensuring the political accountability and democratic legitimacy of the ICC.[53]

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the shield which the Bill of Rights and other parts of the Constitution provide . . . should not be stripped away . . . ."). Domestic critics claim that Article III, Section 2 of the United States Constitution grants sole authority to try United States citizens to United States courts, but safeguards enshrined in the Bill of Rights, including rights to a speedy jury trial, to confront witnesses and to protection against hearsay, are glaringly absent. David M. Baronoff, *Unbalance of Powers: The International Criminal Court's Potential to Upset the Founders' Checks and Balances*, 4 U. PA. J. CONST. L. 800, 804 (2002) (identifying numerous ICC failures to provide safeguards guaranteed by United States Constitution); Smidt, *supra* note 40, at 219. Moreover, international tribunals do not explicitly accord defendants the wide range of defenses available at common law; Smidt, supra note 40, at 219. *See* Cryer, *supra* note 38, at 277 (noting that the Rome Statute categorically rejects superior orders defense); Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 109 (1996) (defining purpose of international criminal tribunals to be "confining conflict" and stating that "[d]eveloping doctrinal defenses . . . is of secondary significance"). Accordingly, Congress, in a precursor to ASPA, found ICC protection of individual rights inadequate under United States law. Protection of United States Troops from Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. § 2(5) (1999).

[53] United States critics question whether the Security Council will retain primary responsibility for maintaining international peace and security as well as the determination of threats to and breaches thereof. *See* U.N. Charter art. 24 (providing that the Security Council has "primary responsibility" for maintaining international "peace and security"); *id.* art. 39 (according to the Security Council, it has sole authority to make a determination of aggression or a threat to or breach of international peace and security). The relationship of the ICC to the U.N. remains uncertain and nothing in the Rome Statute, which provides merely that the ICC will be "brought into relationship with the [UN] through an agreement to be approved by the Assembly of States Parties," implies any role for the ICC in the maintenance of international peace and security. Rome Statute, *supra* note 32, art. 2. However, predecessor tribunals, even where established as subsidiary organs of the UN, have been determined to be operationally independent. Prosecutor v. Tadic, 1995 I.C.T.Y. IT-94-1-AR-72, ¶¶ 37-38 (Oct. 2) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction). Moreover, crimes within ICC jurisdiction—aggression, genocide, war crimes and crimes against humanity—are those most likely to constitute threats to international peace and security and are thus within the primary responsibility of the Security Council. Commentators suggest that by exercising jurisdiction over defendants in particular cases where the Security Council has not made a finding of aggression or a threat to or breach of the peace, the ICC Prosecutor may presuppose state responsibility for the crimes of which the individual is accused and in so doing usurp the exclusive competence of the Security Council. *See* Vera Gowlland-Debbas, *The Relationship Between the Security Council and the Projected Interna-*

Thus, although the ICC commenced operations in March 2003[54] after garnering the support of a majority of states for which it is now the regnant paradigm for enforcing IHL, it lacks the backing of the sole "indispensable nation."[55] The United States signed, but did not ratify, the Rome Statute[56]

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tional Criminal Court, 3 J. ARMED CONFLICT L. 97, 103 (1998) (indicating widespread dissatisfaction with potential conflict between the Security Council and the ICC over definition and prosecution of aggression). While some suggest that in practice the two institutions will reach an accommodation whereby the Security Council will act as a "filter mechanism" through the judicious exercise of discretion, others envision structural conflict due to overlap of the material fields of operation. *See id.* at 111-13. This structural conflict thesis is supported by Article 16 which, rather than commit the ICC to deferring to the veto of a prosecution by a permanent member of the Security Council, requires an affirmative vote of the entire Council in a resolution under Chapter VII to obligate the ICC prosecutor to defer prosecution. Because the United States can, in theory, exercise its Security Council veto power over ICC actions, the United States wants to preserve U.N. primacy. United States officials staunchly opposed the ICC because it will likely undermine that primacy. *Hearing on the United Nations International Criminal Court Before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 1, 6 (1998). Failure to preserve Security Council primacy threatened to decouple the influence of the United States polity, exercised through elected and appointed officials, over the ICC. Because the determination of what justice is and how it is to be administered is a fundamental concomitant of self-government, domestic adversaries assail the ICC as an illegitimate attack on democracy. *See* Bolton, *supra* note 47, at 41 (stating that administration of justice is legitimate "to the extent that it rests on popular sovereignty" and that the ICC, beyond the control of the United States electorate, is therefore democratically illegitimate).

[54] *See* Julia Preston, *U.S. Rift with Allies on World Court Widens*, N.Y. TIMES, Sept. 10, 2002, at A6 (noting approval of $40 million budget for 2003 and adoption of rules for electing judges and a prosecutor).

[55] *See* Samuel P. Huntington, *The Lonely Superpower*, FOREIGN AFF., Mar.-Apr. 1999, at 35, 37 (referring to United States as the "indispensable nation" to global order). After the Gulf Wars, even the staunchest opponents of United States hegemony would likely concede that the United States has a vital leadership role in maintaining international security and that United States participation is a necessary, if not necessarily sufficient, condition for success. On at least this ground, the United States is indeed the sole indispensable nation. *See* Ambassador David J. Scheffer, Address Before the Carter Center (Nov. 13, 1997), *at* http://www.amicc.org/docs/Scheffer11_13_97.pdf (articulating United States indispendability thesis by noting United States participation in peacekeeping, enforcement of U.N. mandates, and humanitarian intervention and stating that "[n]o other government shoulders the burden of international security").

[56] President Clinton signed the Rome Statute on the last possible date—December 31, 2000. Elizabeth A. Neuffer, *U.S. to Back Out of World Court Plan Envoy: Bush Team May "Unsign" Treaty*, BOSTON GLOBE, Mar. 29, 2002, at

and subsequently withdrew its signature.[57] Moreover, the United States has flexed economic muscle and threatened to withdraw from peacekeeping commitments to dissuade ratifications and exempt its nationals from ICC jurisdiction.[58]

A22. Presidents Clinton and Bush refused to submit the treaty to the Senate for its advice and consent as is required for a treaty to have effect as domestic law. *See* U.S. CONST. art. II. § 2 (providing that a treaty becomes law only upon a favorable vote of two-thirds of the Senate).

[57] In May 2002, President Bush informed the U.N. that the United States was no longer a signatory to the Rome Statute. Safire, *supra* note 48. Whether the President has the authority, as a matter of domestic and international law, to "unsign" a treaty is a subject addressed in recent scholarship. *See, e.g.*, David C. Scott, *Presidential Power to "Un-sign" Treaties*, 69 U. CHI. L. REV. 1447, 1460 (2002) (arguing that the President has unilateral authority to withdraw a signed treaty from the Senate to negate the domestic and international legal consequences of a signature); John Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 202 (1996) (allowing that limited normative grounds exist permitting termination of treaties). Nonetheless, by withdrawing its signature, the United States is not a participant in the Preparatory Commission, the body which may draft procedural and evidentiary rules, nor can it vote on the selection of judges or the prosecutor.

[58] In 1998 the Senate Foreign Relations Committee, under Chairman Jesse Helms, began to insert the following boilerplate language expressing opposition to the ICC and warning other states of the consequences of supporting the ICC in the ratification of instruments providing for "mutual legal assistance in criminal matters":

> PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

See 144 CONG. REC. S12,985-01 (daily ed. Nov. 12, 1998). Senator Helms accompanied such provisions with warnings of "grave consequences for our bilateral relations with every nation that signs [the Rome Statute]." James Podgers, *War Crimes Court Under Fire*, ABA J., Sept. 1998, at 66. Clarifying Helms's warning, Defense Secretary William Cohen advised European allies that their support for the ICC would lead to a "re-thinking" of United States overseas troop commitments and the United States role in NATO. Alessandra Stanley, *U.S. Presses Case Against War Court: Two-Thirds of World Opposes Current Plan, U.N. Conference is Told*, INT'L HERALD TRIB., July 16, 1998, at 5. At the same time, the Clinton Administration, concerned with the ramifications of the ICC with respect to the liability of its forces, began to review Status of Forces Agreements with states in which United States military personnel are deployed in order to encourage corrective actions

The American Servicemembers' Protection Act[59] terminates military aid to states parties, precludes United States personnel assignments to missions in their territory and, with the "Hague Invasion Clause,"[60] commands the President to employ "all means necessary," including military force, to rescue any United States national in ICC custody.[61] In short, the United States has "washed [its] hands of the [ICC]."[62]

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regarding this treaty. *Id.*; *see also* William J. Clinton, Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 4 (Dec. 31, 2000) (expressing concerns about politically motivated prosecutions of United States forces). Congress responded with legislation prohibiting the United States from providing military assistance to a non-NATO state party to the ICC unless that state provided treaty assurances that it would not extradite United States military personnel to the ICC. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 899 (2003) [hereinafter ASPA]. By conditioning United States financial and military aid upon cooperation with its agenda, the United States has secured agreements that obligate states to refuse requests to extradite United States military, and in some cases civilian, personnel to the ICC. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 681, 711 (2003) (reporting that as of June 2003, thirty-eight states had concluded bilateral treaties exempting United States personnel from ICC jurisdiction under Article 98(2) of the Rome Statute). Similar pressure has resulted in exemptions from the EU and the UN. *See* S.C. Res. 1487, U.N. SCOR, 58th Sess., 4772d mtg., U.N. Doc. S/RES/1487 (2003) (exempting all U.N. peacekeepers from ICC jurisdiction for one year on renewable basis); Paul Meller, *Europeans to Exempt U.S. from War Court*, N.Y. TIMES, Oct. 1, 2002, at A6 (reporting decision by European Union to refuse ICC requests for extradition of United States military and diplomatic, but not civilian, personnel charged with war crimes). On July 1, 2003 the United States suspended military assistance to thirty-five states that refused to grant immunity to United States citizens. Murphy, *supra*, at 711.

[59] Pub. L. No. 107-206, 116 Stat. 899 (2002). ASPA, designed to "protect United States military personnel and other elected and appointed officials of the United States . . . against criminal prosecution by [the ICC]," prohibits all agencies and entities of the United States, or of any state or local government, from cooperating with the ICC. *Id.* § 2006.

[60] *See* Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM RTS. J. 13, 25 (2003) (coining the phrase).

[61] *See* American Servicemembers' Protection Act of 2001, H.R. 1794, 107th Cong. (2001) (amending, as earlier version of ASPA, the Foreign Relations Authorization Act, H.R 1646, 107th Cong. (2001) (instructing President to use "all means necessary" to effect release on any United States or allied personnel detained against his or her will or on behalf of the ICC)).

[62] Peter Slevin, *U.S. Renounces Its Support of New Tribunal for War Crimes*, WASH. POST, May 7, 2002, at A1.

United States hostility strikes the devoted transnational cadre supporting the ICC[63] as apostasy given the history of United States leadership in the defense and promotion of human rights.[64] In discourses strewn with pious nostrums, universalists deride irresponsible attachments to a realist mode of governance—organized upon principles of state power and sovereignty[65]—that more idealist theories and multilateral institutions—organized upon general principles of equality and law—are said to have displaced.[66] For ICC partisans, not only is the court institutionally superior to the *ancien regime*,[67] but the meritless objections actually militate in its favor.[68] If the United States fears the prosecution of its sol-

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[63] For the most strident proponents of the ICC, the internationalization of judicial tribunals with competence to adjudicate violations of IHL is "not a policy choice, but rather a cultural preference, more akin to a . . . religious choice than an argument deduced from empirical reason." Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 594-95 (2002). For this cohort, the international is always superior to the domestic. *See* Kenneth Anderson, *Reply: Secular Eschatologies and Class Interests of the Internationalized New Class*, *in* RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS? 112-15 (Carrie Gustafson & Peter Juviler eds., 1999) (claiming that an "International New Class," with claims to special legitimacy by virtue of their "planetary pretension," is the engine behind a legal globalization agenda that prioritizes enforcement of IHL through the ICC and privileges international institutions over local governance).

[64] The United States has signed few and ratified fewer of the instruments elaborating "human rights" to the extent that the impetus for the development of international human rights law was born of the Allied defeat of Nazi Germany and the development and application of legal standards to punish systematic violations of those standards by United States lawyers. However, one can argue that the United States has led the promotion and protection of human rights since their legal origins. Although this argument is undermined by the pattern of selective United States engagement in the defense of human rights (i.e., in Bosnia, but not in Rwanda; in Kosovo, but not in Chechnya or Tibet), this position is buttressed by the fact that few other nations place their troops and their treasure at risk in defense of the principles they proclaim.

[65] Realists contend that only those institutions that reflect the interests of their states parties can hope to be effective in the creation of the enforcement of law. *See* Bos, *supra* note 42, at 40. International criminal tribunals depend for their success upon the degree to which states are willing to sacrifice their sovereignty to aid in the "fortification of the global rule of law." Slaughter, *supra* note 35, at 9. Where states are unwilling to comply with IHL obligations, military force is necessary to ensure obedience and only other states possess such currency in abundance; consequently, it is to those states that institutions must turn if IHL is to be enforced and states will only do so to the degree they perceive inherent advantage. Moreover, the most powerful states will remain beyond the reach of IHL because no other state or states will have the power to enforce violations committed by the most powerful states. The assumption that a stable IHL regime must reflect the practical interests and capabilities of powerful states, rather than the moral aspirations of non-state actors or weak states, is central to

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realist IHL scholarship.

[66] For a discussion of the globalist vision of IHL and the formal institutional enforcement model embodied by the ICC, see generally TOWARD AN INTERNATIONAL CRIMINAL COURT?, *supra* note 35. Again, however, note that not all academics are so critical of the United States position as are the most dedicated of globalists. *See, e.g.*, Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role if International Non-governmental Organizations and the Idea of Civil Society*, 11 EUR. J. INT'L L. 91 (2000) (arguing that "[t]o frame the issue as one of US unilateralism . . . as against the virtuously internationalist world gets it wrong" as "some unilateral US actions tend in the direction of US imperialism as an alternative to what I have called 'international legal imperialism,' the nascent imperialism, the willingness to impose supranational rule, that is the consequence of assertions of the sovereignty of supranational institutions"). In essence, the conflict between proponents and opponents of the ICC may well be the spawn of an existential conflict between European elites who govern international NGOs who have seized upon the ICC as a "means to resist, at least at the rhetorical level, American imperialism," and United States democrats whose transcendent moral and political principle—consent of the governed—does not permit joining in a "mystical" venture toward an international civil society governed by decree from afar. *Id.* at 102-10. Anderson suggests that the scholarly and activist community advancing the cause of the ICC has organized theoretical and practical energies around an internationalist, legal imperialist agenda of the NGOs and their European elites. *Id.*

[67] *See* Marshall Cohen, *Morality and the Laws of War*, *in* PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS, *supra* note 28, at 86-87 (contending that the ICC is the "best available way to mitigate the corrosive effects of mortal combat . . . [g]iven the current realities of international politics").

[68] ICC advocates counter each asserted basis of opposition. To claims that the ICC Prosecutor will selectively prosecute, they stress that the Rome Statute, under Article 20(3)(b), coupled with complementarity, eliminates the opportunity for politicization of justice by placing the burden of proof upon the prosecutor to demonstrate, prior to initiating a prosecution and to the satisfaction of two of the three judges in the Pretrial Chamber, that the state of nationality of the accused affirmatively failed to independently and impartially administer justice. *See* Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 906-07 (2002). With respect to the definition of crimes within ICC jurisdiction, proponents of the Rome Statute contend that, although the definitions remain fuzzy, the sole method of remedying these definitional shortcomings is accession to membership because only members may participate in the work of the Preparatory Committees charged with more precise articulation of the definitions of crimes. *See* David, *supra* note 40, at 404-05. Insofar as the rights of the accused are concerned,

diers, it need only ensure that they do not commit war crimes, or punish them when they do.[69] By its opposition the United States, according to this globalist philosophy, has stuck itself on the wrong side of history.[70]

If the asserted bases accurately portrayed the grounds upon which the United States eschews participation, a quick solution could be crafted:[71] the United States might accede to the Rome Statute, join in the (re)definition of crimes within ICC jurisdiction, secure the permanent immunity of peacekeepers operating under Security Council mandate,[72] amend the Statute to enhance individual rights and elaborate complementarity to support deference to domestic judicial processes. However, the etiology of United States disaffection is traceable less through statutory provisions than through a post-September 11th set of understandings concerning the challenge posed by the intersection of international terror-

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supporters of the ICC extol the abundance of provisions in the Rome Statute that ensure protection of criminal defendants while suggesting that these provisions provide greater protection than is constitutionally necessary or functionally prudent. *See* Podgers, *supra* note 58, at 69 (citing claims that the Rome Statute provides "layers of protection" against undue prosecutions). *But see* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 417 (2000) (suggesting that the safeguards afforded defendants in the ICC are actually "excessive").

[69] *See* Kenneth Roth, *Speech One: Endorse the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT?, *supra* note 35, at 27 (contending that the ICC will not substitute its judgment for that of United States courts unless the United States "insist[s] on shielding criminal suspects from legitimate investigation and prosecution," which is highly unlikely because "it is firm American policy to prosecute any rogue soldier who might commit a war crime"). An additional option is to accede to the Rome Statute while suspending acceptance of ICC jurisdiction over war crimes for seven years. *See* Rome Statute, *supra* note 32, art. 124 (permitting a party to "opt out" of ICC jurisdiction over war crimes for a nonrenewable seven year period upon accession).

[70] Some critics of the United States abandonment of the ICC proclaim a devolution "backward to the anarchic world of pre-Nuremberg." King & Theofrostus, *supra* note 52, at 104-05.

[71] *See, e.g.*, Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT'L L. 291, 297 (2000) (arguing for qualified United States participation in the ICC under certain stated conditions).

[72] *See* Roth, *supra* note 69, at 32 (noting proposals to grant such immunity to United States peacekeepers out of recognition of the "special responsibilities" shouldered by the United States in the maintenance of international peace).

ism[73] and weapons of mass destruction (WMD),[74] along with the proper role of IHL in the battle against this threat to civilization.[75]

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[73] Although the very definition of "terrorism" is to some extent a political exercise, the proliferating definitional offerings coalesce around the notion that "terrorism" is the threat or use of violence with the intent to cause fear in a target group in order to accomplish political objectives. *See generally* United Nations Treaty, Conventions on Terrorism, *at* http://untreaty.un.org/English/Terrorism.asp (listing twelve conventions and protocols defining terrorism); TERRORISM AND INTERNATIONAL LAW 27 (Roslyn Higgins & Maurice Flory eds., 1997) (listing and discussing instruments related to terrorism). United States federal law defines terrorism as activities that

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State [and] (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.

18 U.S.C. § 2331 (2000 & Supp. 2001). A leading academic definition considers terrorism to be "the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet political (or quasi-political) objectives of the perpetrators." OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 162-63 (1991). Although no single definition is universally accepted, the elements of civilian targets, violence and political extortion are found in almost every working definition and the United Nations has imposed a duty upon every state "to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force." S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992); *see also* S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶¶ 1-3,b, U.N. Doc. S/RES/1373 (2001) (obligating all member states to deny financing, support, and havens to terrorists and affirming the right of self-defense against "terrorist acts").

[74] A "weapon of mass destruction" is defined as "any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of (A) toxic or poisonous chemicals or their precursors; (B) a disease organism; or (C) radiation or radioactivity." 50 U.S.C. § 2302(1) (2000).

[75] Theories abound in answer to the question, "What is the purpose of law?," with utilitarians, natural legal theorists, materialists, legal positivists, libertarians, socialists, statistics, developmentalists, critical legal scholars and others weighing in with arguments. *See generally* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999). Many of the extant theories of law converge around the hypothesis that the purpose of law is to direct and limit government in the collective organization of the defense of life, liberty and property, and to preserve civilization against threats to these core values, a hypothesis central to the current work. *See* FREDERIC BASTIAT, THE LAW 6-7 (Dean Russell trans., Foundation for Economic Education, Inc. 1950) (1850) (synthesizing several

Although these criticisms are not meretricious, a "decent Respect to the Opinions of Mankind"[76] urges a declaration of the causes that impelled the United States to reject a venture to which many states have committed themselves.

2. Criminalization of the War on Terror? The Bush Doctrine and the ICC

Prior to the attacks of September 11, 2001, terrorism was widely considered, like narcotrafficking or counterfeiting, a transnational law enforcement problem necessitating institutional cooperation between civilian criminal justice systems of concerned states.[77] The United States and other states scored several apparently major legal victories against international terrorists in civil courts, an outcome that seemed to support the utility of the transnational judicial response to terrorism,[78] and the negotiations toward the Rome Statute

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strands of legal theory to postulate the purpose of law). The notion that law serves as firebreak against threats to civilization has acquired purchase in international jurisprudence and illuminates the thesis that the nexus of terrorism and weapons of mass destruction is a threat to which law is obliged to respond. *See* Legality of the Threat or Use of Nuclear Weapons (United Nations), 1996 I.C.J. 226, 375 (July 8) (Shahabuddeen, J., dissenting) (stating that the purpose of law is not merely to resolve disputes but to protect civilization).

[76] *See* THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776) (conceding that the international community, of which the United States was a constituent "People," was entitled to a statement of causes for United States secession from Britain).

[77] *See* Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 313 (2003); *see also* Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of International Legal Order*, 81 N.C. L. REV. 1, 4-5 (2002) (suggesting international terrorism is amenable to a civilian solution); Emanuel Gross, *Trying Terrorists—Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights*, 13 IND. INT'L & COMP. L. REV. 1, 31 (2002) (stating that terrorism is "no different than any other criminal offense"); Symposium, *supra* note 39, at 750-53 (contending, prior to September 11th, that terrorism could be reduced or eliminated by states ceding sovereignty to transnational organizations); Robinson O. Everett, *The Law of War: Military Tribunals and the War on Terrorism*, FED. LAWYER, Nov./Dec. 2001, at 20 (arguing that terrorism violates the laws of nations but not IHL). Although it offered no assistance in enforcing its pronouncements condemning terrorism, for adherents to the criminal justice paradigm the U.N. was the logical place to turn to organize such cooperative efforts. Smidt, *supra* note 40, at 232-33.

[78] On November 4, 1998, Usama bin Laden and members of the al Qaeda

nearly included terrorism as a crime within ICC jurisdiction, underscoring widespread support for judicial responses to the phenomenon.[79] However, while eradication of the global scourge of terrorism may benefit from allied judicial efforts, the attacks unleashed on the United States that infamous morning fundamentally transformed, from the United States vantage point, perceptions of the nature and magnitude of the danger and, consequently, the proper instrumentalities to employ and objectives to pursue in response.[80] September

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terrorist organization were indicted in United States District Court for the Southern District of New York for orchestrating acts of terrorism against United States nationals, including bombing United States Embassies in Nairobi, Kenya, and Dar As-Salaam, Tanzania. *See* Indictment, United States v. bin Laden, S(10) 98 Cr. 1023 (LBS) (S.D.N.Y. Nov. 4, 1998) (charging Usama bin Laden and others with conspiracy, bombing United States embassies, 224 counts of murder, leadership of a "terrorist group dedicated to opposing non-Islamic governments with force and violence," seeking to obtain WMD and ordering followers to attack United States forces in Muslim countries and commit genocidal war against United States citizens), *available at* http://news.findlaw.com/hdocs/docs/binladen/usbinladen-1a.pdf. Because the capture and trial of these defendants was considered critical to United States national security, the conviction of several in spring 2001 was, at the time, considered to be a national security coup. *See, e.g.,* Elizabeth Neuffer, *Four Guilty in Embassy Bombings*, BOSTON GLOBE, May 20, 2001, at A1 (reporting conviction of four participants on 302 counts in destruction of United States embassies and deaths of 224 people, including twelve Americans).

[79] *See* Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 13-62 (2002) (discussing history of negotiations and prospects for future inclusion of terrorism within Rome Statute).

[80] Immediately following the attacks, President George W. Bush declared a national emergency and Congress delegated him extensive authority to, inter alia, "use all necessary and appropriate force" in defense of the United States against the authors of September 11th. *See* Declaration of National Emergency, Proclamation 147,463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (declaring the United States to be in a state of emergency by virtue of the terrorist attacks of September 11, 2001); *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (enacted Sept. 18, 2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"). In jettisoning the judicial approach, the Bush Administration determined that the deterrence failures that led to September 11th were attributable to the inadequacy of the judicial approach, that future such attacks could only be prevented by reestablishing a credible threat of punishment for would-be attackers and that no institution other than the United States military could mount such a threat. Smidt, *supra* note 40, at 157-58; *see also* Ruth Wedgwood, *The Law at War: How*

11th—the first day of a new historical era—withdrew the veil of ignorance, and the United States now concedes that, after a decade of denial,[81] it is at war[82] against a menace no less

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Osama Slipped Away, NAT'L INTEREST, Winter 2001-02, at 69, 71-72 (deriding as a "very dangerous intellectual failure" the application of criminal law, rather than force, to overcome the scourge of terrorism). Not all commentators have been so easily swayed from the criminal justice model. *See, e.g.*, Keith Hayward & Wayne Morrison, *Locating "Ground Zero": Caught Between the Narratives of Crime and War*, *in* LAW AFTER GROUND ZERO 140-57 (John Strawson ed., 2002) (contending that the terrorists of September 11th are best described by some indeterminate term between criminals and "agents of war"); Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE U. INT'L L. 325, 326 (2003) (undertaking a strict positivist interpretation of IHL texts to reject any basis for classifying the belligerency with al Qaeda as "war" and insisting on retention of criminal designation). Others suggest that the United States abandoned the criminal justice model for a military approach during the latter half of the 1990s, well before September 11th. *See, e.g.,* Todd M. Sailer, Comment, *The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 TEMP. INT'L & COMP. L.J. 311, 311 (1999). However, September 11th caused the United States to "s[ee] the existing evidence in a new light," and the restructuring of United States foreign policy toward military solutions to the problem of terrorism dates to that infamous day. *See Powell Defends War Amid Doubts*, CBSNews.com (July 10, 2003), *at* http://www.cnnnews.com/stories/2003/07/10/iraq/main562701.shtml.

[81] Every year the President must submit a report to Congress on the national security strategy of the United States *See* Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 603, 100 Stat. 992 (1986) (imposing this obligation). The United States National Security Strategy, issued in September 2002, rejects the judicial approach to combating terrorism and confesses that "[i]t has taken almost a decade for us to comprehend the true nature of th[e] new threat" and react accordingly. *See* National Security Strategy of the United States of America (September 2002), at 15, *available at* www.whitehouse.gov/nsc/nss.pdf [hereinafter NSSUSA].

[82] The official United States assessment is that the attacks of September 11th effected a general declaration of war by global terrorist organizations and their state sponsors against the United States *See* Elaine Sciolino, *Long Battle Seen*, N.Y. TIMES, Sept. 16, 2001, § 1, at 1 ("We're at war. There's been an act of war declared upon America by terrorists, and we will respond accordingly." (quoting address by President Bush to the National Security Council)); Statement of Secretary of Defense Donald H. Rumsfeld Before the Senate Armed Services Committee (Dec. 12, 2001), *available at* http://www.senate.gov/~armed_services/statemnt/2001/011212wolf&rums.pdf ("The September 11th attacks were acts of war. The people who planned and carried out these attacks are not common criminals—they are foreign aggressors . . . ."). Commentators concurred with this official assessment. *See, e.g.*, Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 1-9 (2003) (concluding that the September 11th attacks resembled acts of war within the meaning of IHL in that they were extraordinarily

threatening to its existence than the great wars, hot and cold, of the 20th century.[83] In response, the United States has pledged that, while it will mean a long hard struggle to defeat all the individuals, groups and states[84] involved, victory in

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severe, orchestrated from abroad by an organized enemy, directed against the United States as a whole and treated as such by state governments and international organizations, including NATO and the UN); W. Michael Reisman, Comment, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 88 n.14 (2003) (stating that "[o]nly a most technical and arid legalism could deny [that the United States is in a state of war with al Qaeda]"). The war on terror has not been concluded with the defeat of the Taliban or the Hussein regime in Iraq; rather, it has just begun. *See Transcript of President Bush's Remarks on the End of Major Combat in Iraq*, N.Y. TIMES, May 2, 2003, at A16.

> "The battle of Iraq is one victory in a war on terror that began on September 11th, 2001, and still goes on. . . . Any person, organization or government that supports, protects, or harbors terrorists is complicit in the murder of the innocent, and equally guilty of terrorist crimes. Any outlaw regime that has ties to terrorist groups, and seeks or possesses weapons of mass destruction, is a grave danger to the civilized world, and will be confronted.

Id. Arguments that it is juridically impossible to be at war with non-state actors may well be sound in terms of their fidelity to legal technicalities. *See, e.g.*, Stacie D. Gorman, Comment, *In the Wake of Tragedy: The Citizens Cry Out for War, but Can the United States Legally Declare War on Terrorism?*, 21 PENN ST. INT'L L. REV. 669, 685-88 (2003) (concluding that, under domestic and international law, only sovereign entities—i.e., states—possess the legal personality necessary to be the objects of a declaration of war). However, they miss the point that terrorism poses as significant a threat to United States vital interests as do states and that the judicial response is inadequate to resolve the threat. *See* Roberto Iraola, *Military Tribunals, Terrorists, and the Constitution*, 33 N.M. L. REV. 95, 114 (2003) ("[A] state of war exists between the United States and al Qaeda, [a terrorist group that] has openly proclaimed war against the United States and has repeatedly carried out attacks against us."). *But see* Mark Osler, *Capone and bin Laden: The Failure of Government at the Cusp of War and Crime*, 55 BAYLOR L. REV. 603, 611 (2003) (rejecting characterization of the war on terror as "war").

[83] *See* Charles Feldman & Stan Wilson, *Ex-CIA Director: U.S. Faces "World War IV"* (Apr. 3, 2003), *at* http://www.cnn.com/2003/US/04/03/sprj.irq.woolsey.world.war/ (quoting former CIA Director James Woolsey as describing war on terror as a "fourth world war," following World Wars I & II and the Cold War, in which the threat to the United States is at least as extreme as these earlier conflicts); David B. Rivkin Jr. & Lee A Casey, *That's Why They Call It War*, WASH. POST, Mar. 16, 2003, at B4 (describing war on terror as a "long-term life or death struggle" in which the United States has "never been more threatened").

[84] State terrorism and sponsorship of terrorist groups is of special concern because states have the resources to project and sustain violence on a systematic, global basis. *See* President George W. Bush, State of the Union Address (Jan. 29,

the war on terror is certain.[85]

However, the United States faces foes that arm themselves with WMD, present no static targets,[86] abjure legal restraint[87] and deliberately murder civilians. United States armed forces, trained to observe and obey limitations imposed by IHL,[88] are distinctly disadvantaged by a grossly asymmetrical legal framework in which morally inferior warriors[89]

2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html (labelling Iran, North Korea and Iraq an "axis of evil" due to sponsorship of terrorist groups and signaling that the United States would "not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons").

[85] *See* R.W. Apple, *A Clear Message: "I Will Not Relent,"* N.Y. TIMES, Sept. 21, 2001, at A1 (reporting a presidential address to a joint session of Congress on September 20, 2001, in which President Bush stated that the United States effort would not stop "until every terrorist group of global reach has been found, stopped and defeated").

[86] In contrast to states, which present "fixed addresses" against which measures may be directed in reprisal for their initial use of force, terrorist organizations are an inchoate conglomeration of entities that operate as part of "shadowy" networks, independent in some instances of the control or direction of the states in which they are physically located. This renders it very difficult to employ anti-terrorist countermeasures that do not simultaneously inflict harm upon these non-culpable states, many of which are as distressed about the presence of terrorists in their midst as are the victims of their terrorism. *See* Drumbl, *supra* note 77, at 47-48 (discussing the legal difficulties in directing proportional and precise military force against non-state actors).

[87] Terrorism, the "totalitarian form of war and politics," rejects any obligation to adhere to the dictates of law or morality and in so doing "shatters [IHL]." Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 233 (2001). Among the more reprehensible tactics they employ is sheltering their number in areas populated by civilians in order to "exploit the rules of the game . . . , which categorically state that the civilian population must not be involved in the armed conflict." *Id.* at 234. This and other violations of IHL were committed by forces fighting for the Saddam Hussein regime in Iraq. *See* Neil A. Lewis, *U.S. Is Preparing to Try Iraqis for Crimes Against Humanity and Mistreating Prisoners*, N.Y. TIMES, Mar. 29, 2003, at B14 (listing Iraqi violations of IHL, including mistreatment and extrajudicial killing of POWs, perfidious surrender, fighting in civilian garb, using civilians as human shields, employing hospitals and ambulances to military ends and placing cash bounties on United States pilots).

[88] *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 5-2 (2000) (stating the policy of the United States to comply with IHL under all circumstances to the extent practicable and feasible).

[89] *See* Michael F. Noone, Jr., *Applying Just War Jus in Bello Doctrine to*

enjoy all its protections but respect none of its obligations. This legal asymmetry, coupled with the destructive capacity of weapons brought rapidly and unexpectedly to bear by enemies against whom deterrence is impossible,[90] erodes the United States military advantage. The reduction in power differential triggered by this synthesis of WMD and terrorists' exploitation of legal compliance disparities renders ultimate United States victory more costly in lives and treasure, and more uncertain.

In light of this strategic reconfiguration, the United States has, albeit belatedly,[91] enhanced the flexibility of its policy options. The Bush Doctrine proclaims the rights to employ preemptive measures in self-defense,[92] depose regimes har-

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Reprisals: An Afghan Hypothetical, 51 CATH. U. L. REV. 27, 27-32 (2001) (applying pejorative label "warriors" to individuals who war in the absence of legal restraint and "soldiers" to those who accept legal limitations on the available methods and means); *see also* Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 297, 297-98 (1987) (relegating terrorists from the category of lawful combatants to the pariah category of "unlawful belligerents").

[90] NSSUSA, *supra* note 81, at 15 (contending that deterrence is ineffective against the deadly threat of Islamic terrorists whose "avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death").

[91] Two decades ago it was apparent to prescient commentators that the United States would one day face a war against terrorists with Western civilization as the stakes. *See, e.g.*, Jeanne J. Kirkpatrick, Speech at the Jonathan Institute's Conference on International Terrorism (June 25, 1984) ("There is a coming terrorist war [against the United States], [that] is part of a total war which sees the whole society as an enemy, and all members of a society as appropriate objects for violent actions.").

[92] The United States now embraces preemptive self-defense, a doctrine that claims the right of a state to use unilateral force even in the absence of legal authorization from the UN, to eliminate an incipient threat that is not yet operational but which, if permitted to mature, could be reduced only at a much greater cost. *See* NSSUSA, *supra* note 81, at 15 (stating that the "immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit . . . let[ting] our enemies strike first"); *see also* David E. Sanger, *Bush Renews Pledge to Strike First to Counter Terror Threats*, N.Y. TIMES, July 20, 2002, at A3 (reporting message from President Bush to United States troops in Afghanistan stating that the United States will preemptively strike against states developing WMD and that "America must act against these terrible threats before they're fully formed"); President George W. Bush, National Strategy to Combat Weapons of Mass Destruction 3 (Dec. 2002), *available at* http://www.state.gov/documents/organization/16092.pdf ("Because deterrence may not succeed, and because of the potentially devastating

boring terrorists,[93] eliminate terrorist leadership[94] and bring evermore sophisticated weaponry to bear upon these adversaries.[95] However, rather than reap gratitude for shouldering a disproportionate burden in the war on terror, the United States has been accused of opprobrious conduct arising from the proactive use of force, the use of certain weapons systems[96] and collateral damage resulting therefrom.[97] The in-

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consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures."). For an extended discussion of the doctrine of preemptive self-defense at domestic and international law, see *infra* note 597.

[93] *See* President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://www.house.gov/hayworth/jdcontent/news/120701.shtml ("Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.").

[94] Targeted killing of terrorist leaders may preclude subsequent acts of terrorism, produce fewer casualties than other options, inflict greater disruption on terrorist groups and leave no prisoners to become causes for future terrorist attacks. Daniel B. Pickard, *Legalizing Assassination? Terrorism, The Central Intelligence Agency, and International Law*, 30 GA. J. INT'L & COMP. L. 1, 31-32 (2001). On this basis, the United States has added this policy option to its anti-terrorist arsenal. *See* John Diamond, *Shackles Loosened on U.S. Intelligence*, USA TODAY, July 9, 2002, at 8A (reporting that the Bush Administration has authorized executive agencies to overthrow regimes and eliminate foreign leaders); James Risen & David Johnston, *War of Secrets: Not Much Has Changed in a System that Failed*, N.Y. TIMES, Sept. 8, 2002, § 4, at 1 (reporting that CIA Special Activities Division has been activated for covert operations and authorized to use deadly force against terrorists). For a discussion of the domestic and international legal regimes governing assassination, see *infra* note 510.

[95] Examples of sophisticated weapons systems either in development, making their debut or being used widely in the war on terror include precision-guided munitions ([PGMs), lasers, depleted uranium munitions, carbon fiber bombs and unmanned aerial vehicles. *See* Richard Whitby, *High-Tech Hardware in War on Terror*, N.Y. DAILY NEWS, Sept. 8, 2002, at 24.

[96] Certain means of war, such as various types of ammunition that cause unnecessary suffering and biological weapons, have long been proscribed by treaties. *See, e.g.,* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (banning the use of land mines); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (prohibiting development, production or use of chemical weapons); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Inju-

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rious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1523 [hereinafter CCW] (prohibiting weapons that use fragments not detectable by X-ray, regulating mines and booby traps and regulating incendiary weapons); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 164 [hereinafter BWC] (prohibiting the development, stockpiling, and use of biological weapons); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (forbidding use of gas and bacteriological weapons but not outlawing development); Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention of 1907] (committing parties to pass domestic military regulations incorporating the protections of POWs provided for therein, precluding the use of many weapons systems and providing protection for religious and cultural institutions); Convention with Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899, art. 23, 32 Stat. 1803, 1817, 1 Bevans 247 (limiting the methods and means of warfare that cause "superfluous injury" or unnecessary suffering). In recent years a movement, the purpose of which is to deny technologically sophisticated states the legal capacity to employ advanced weapons systems, has gained momentum. *See* ROGER W. BARNETT, ASYMMETRICAL WARFARE 120 (2003) (discussing longstanding efforts to prohibit napalm and fuel-air explosives); Smidt, *supra* note 40, at 226 (discussing this development); Nicholas Wade & Eric Schmitt, *U.S. Use of Tear Gas Could Violate Treaty, Critics Say*, N.Y. TIMES, Apr. 5, 2003, at B13 (reporting contention that United States use of riot control agents would violate the Chemical Weapons Convention). *See generally* STUART MASLEN, ANTI-PERSONNEL MINES UNDER HUMANITARIAN LAW (2001) (discussing process whereby anti-personnel mines have been proscribed by multilateral treaty and noting efforts to extend the application of the treaty to non-ratifying states). This effort rests largely upon declarations, unsupported by state practice, that the weapons system in question is violative of customary IHL principles. *See, e.g.*, The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241 (July 8) (stating, in an advisory opinion, that the use of nuclear weapons, in addition to other environment-altering weapons, may give rise to a violation of customary IHL); Smidt, *supra* note 40, at 226 (speculating that lasers and mines will soon be declared violative of customary IHL despite persistent state dissent); *War Crimes Tribunal May Probe DU*, BBC NEWS (Jan. 14, 2001), *at* http://news.bloc.co.uk/2/hi/europe/1117554.stm (quoting chief prosecutor of the ICTY as stating that the use of depleted uranium (DU) munitions by NATO may constitute a war crime on the sole ground that DU munitions violate customary IHL). The set of banned weapons recognized by the United States is considerably narrower than the set claimed by NGOs whose aggressive moves to declare such systems prohibited augur ill for technologically sophisticated states engaged in conflicts, such as anti-terrorist operations, where such systems have significant utility. *See* Carnahan, *supra* note 43, at 732 (discussing controversy in depth).

[97] Whereas the customary IHL principle of distinction has traditionally imposed a strict prohibition against the *deliberate* targeting of noncombatant personnel and civilian targets, thereby implying that specific intent to target noncombatants or civilians is required to prove criminal liability, IHL activists, contending

jection of the ICC into this equation bodes ill for the eventual defeat of international terrorism. Despite the seemingly self-evident fact that United States operations are designed to, and have the effect of, preventing depredations,[98] the constellation of actors hostile to the war on terror may well, if permitted, hijack the ICC as an accomplice in the criminalization of the Bush Doctrine (along with the civilians who crafted it[99]

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that advances in military technology have facilitated much greater precision, now argue that the standard for criminal liability when an attacker misses a military target and causes collateral damage should be mere negligence. *See* Roberts, *supra* note 48, at 46 (stating that the reduction in the burden of proof in a case alleging a violation of the principle of distinction will leave combatants and civilian decisonmakers constantly subjected to second-guessing over weapon and target selection and liable to prosecution for misjudgments made even in conditions of great uncertainty). The subjection of targeting decisions, whether ex ante or ex post, to the review of a judicial body such as the ICC is, for many commentators, not a serious option. Smidt, *supra* note 40, at 229. The further introduction of a negligence, rather than a specific intent, standard renders this proposal even more objectionable. *See* Kenneth Anderson, *Who Owns the Rules of War*, N.Y. TIMES, Apr. 13, 2003, § 6 (Magazine), at 38 (arguing that even employing this reduced standard, negligence "has to consist of more than a lot of collateral damage, including gruesome civilian death and injury, that might be the result simply of a cruise missile aimed in good faith but gone astray").

[98] It seems inarguable that operations in suppression of terrorism can reasonably be thought to fit within this category; the General Assembly has approved this thesis in declaring support of terrorists as "acts of aggression" constitutive of an "armed attack" against which the right to self-defense appertains. G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex art. 3(g), U.N. Doc. A/RES/3314 (1975). *See generally* Constantine Antonopoulos, *The Unilateral Use of Force by States After the End of the Cold War*, 4 J. ARMED CONFLICT L. 117 (1999) (arguing that UNSCRs 1368 and 1373, which recognize the "inherent" right of self-defense against terrorism, implicitly authorize the exercise of such a right).

[99] In the view of a number of senior civilian United States decisionmakers, they themselves, and not the troops they dispatch to do battle in the war on terror, are the most valuable prize to be claimed through the manipulation of the ICC agenda by the enemies of the United States in concert with politically motivated prosecutors and judges. *See* Bolton, *supra* note 47, at 43 (suggesting that the "top civilian and military leaders, those responsible for our defense and foreign policy are the real potential targets of the ICC's politically unaccountable prosecutor"). Recent indictments lodged against senior civilian and military decisionmakers, United States and otherwise, including the heads of state of the United States and Israel, in the domestic courts of several states lend credence to this speculation. *See, e.g.*, L.C. Green, *Enforcement of the Law in International and Non-International Conflicts—The Way Ahead*, 24 DENV. J. INT'L L. & POL'Y 285, 314 (1996) (discussing phenomenon whereby a number of states, including the UK, Canada, Australia and Belgium, have amended their criminal codes to

and the troops who execute it) and the indemnification of terrorism.[100] In light of ongoing contestation over the parameters of IHL, it is not inconceivable that exercise of ICC jurisdiction over the crime of "aggression" (as it comes to be defined[101]) could result, particularly if such exercise is at odds

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permit the exercise of universal jurisdiction in order to indict senior military and civilian officials of other states for war crimes and crimes against humanity); Jeffrey T. Kuhner, *Iraqis Target Gen. Franks for War Crimes Trial in Belgium*, WASH. TIMES, Apr. 28, 2003, at A1 (reporting the filing of a criminal complaint against General Tommy Franks, commander of the liberation of Iraq, alleging in a Belgian court that was granted universal jurisdiction under a 1993 Belgian law, command responsibility for the commission of war crimes by unknown United States soldiers. *But see* Paul Geitner, *"Universal Jurisdiction" is Removed from War Crimes Law*, MIAMI HERALD, Aug. 2, 2003, *available at* http://www.miami.com/mld/miamiherald (reporting the amendment of the Belgian law after its "abuse and manipula[tion] for political ends" and damage to relations with states with which Belgium had had "excellent rapport" (quoting Belgian Foreign Minister Louis Michel)).

[100] To require the United States to first absorb a terrorist attack prior to undertaking self-defense measures would be to "giv[e] the bad guys a 'free kick' at the start of the conflict." Robert F. Turner, *It's Not Really "Assassination": Legal and Moral Implications of Intetenionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 U. RICH. L. REV. 787, 804 (2003).

[101] A long quasilegislative history precedes attempts to define the crime of "aggression" at international law. *See generally* Jonathan A. Bush, *"The Supreme . . . Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324 (2002) (chronicling this history); Charter of the IMT, *supra* note 32, art. 6 (defining "crimes against peace" as including "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances"). Although the crime of aggression was included within ICC jurisdiction, the negotiating parties could not agree upon a definition. *See* Van de Kieft, *supra* note 48, at 2359-63 (describing various proposed definitions of aggression giving rise to individual criminal liability, including an option that would require a determination of state responsibility for an unlawful war as a condition precedent, a second option limiting individual liability to those ordering the aggressive acts and a third identical to the first with the exception that peacekeeping operations were exempted). As a result, the ICC will not exercise jurisdiction over aggression until the states parties agree, by a seven-eights majority, to a definition and to any conditions precedent. In no event will this occur prior to seven years after the entry into force of the Rome Statute. *See* Rome Statute, *supra* note 32, art. 5(1)(d) (granting the ICC jurisdiction over the crime of aggression); *id.* art. 5(2) (providing that the ICC "shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the [ICC] shall exercise jurisdiction"); *id.* arts. 121, 123 (providing rules and procedures for voting amendments to the ICC). Were the ICC to define aggressuib to rule that a necessary and pro-

with Security Council,[102] in an attempt to hale United States personnel to the Hague to answer charges levied by a state sponsor of terrorism[103] for operations that result in unin-

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portional response to a terrorist attack is not a measure in self-defense, such a definitional approach would incriminate states operating in self-defense and simultaneously insulate terrorists, along with the states harboring them, from responsibility for their actions if states that would otherwise employ force in response to terrorist attacks were dissuaded from doing so out of concern that their actions would give rise to legal liability. *See* Smidt, *supra* note 40, at 206 (commenting that an overbroad definition of aggression "may have the unintended consequences of protecting [terrorists]").

[102] Although Article 5(2) of the Rome Statute provides that the exercise of ICC jurisdiction over the crime of aggression "shall be consistent with the relevant provisions of the Charter of the United Nations," and although the U.N. Charter accords the Security Council the "primary responsibility for the maintenance of international peace and security," U.N. CHARTER art. 24(1), and the exclusive competence to "determine the existence of any . . . act of aggression," U.N. CHARTER art. 39, under the Rome Statute the ICC prosecutor is empowered, in theory, to usurp the authority of the U.N. Security Council by indicting an individual for the crime of aggression without an Article 39 finding by the Security Council that the state of nationality of the individual committed an act of aggression, an eventuality anathema to the United States. *See Hearing on the Creation of an International Court Before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Cong. 60 (1997) (statement of Sen. Helms) [hereinafter *Hearing*] ("I think I can anticipate what will constitute a crime of 'aggression' in the eyes of [the ICC]: it will be a crime of aggression when the United States takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations."); King & Theofrastous, *supra* note 52, at 100 & n.213 (indicating that for some members of Congress inclusion of aggression in the Rome Statute was a "new and capricious attempt," reminiscent of the ICJ judgment against the United States for its support of the Contras, to circumscribe the Security Council and "reign in U.S. unilateral actions," such as Grenada, Nicaragua, Libya and Panama); Jennifer Trahan, *Defining "Aggression": Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum*, 24 LOY. L.A. INT'L & COMP. L. REV. 439, 440 (2002) (concluding that the ICC Prosecutor is not restricted by operation of the Rome Statute from making a determination of the existence of an act of aggression independent of a contrary Security Council determination). In response to congressional anxiety over the prospect that the ICC would effectively dilute the United States veto of sanctions directed against it by the Security Council, Congress, in the American Servicemembers' Protection Act, stated emphatically that "[a]ny agreement within the Preparatory Commission that . . . usurps the prerogative of the United Nations Security Council under Article 39 of the charter of the United Nations to 'determine the existence of any . . . act of aggression' would contravene the charter of the United Nations." ASPA, *supra* note 58, at § 2002 (Findings).

[103] United States critics of international institutions rail against the idea that

tended civilian casualties[104] or the use of "disproportionate"

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democratic nations are susceptible to legal judgment by dictatorships and rogue states. *See Hearing*, *supra* note 102. However, the international legal principle of the formal equality of states does not permit a distinction to be drawn between democratic states and dictatorships with respect to the question of standing to bring a complaint in the ICC. *See* U.N. CHARTER art. 2 (enshrining formal legal equality of states). By the same token, the principle does not prevent awarding the chair on the U.N. Human Rights Committee and the U.N. Conference on Disarmament to states such as Libya and Husseinist Iraq respectively. *See Showdown: Iraq* (CNN television broadcast, Feb. 8, 2003) (reporting naming of Iraq as co-chair of the Conference with responsibilities for monitoring compliance with numerous weapons control treaties despite its failure to comply with U.N. sanctions banning its own possession of various weapons systems).

[104] The Rome Statute prohibits knowingly attacking a target that "will cause incidental loss of life or injury to civilians." Rome Statute, *supra* note 32, art. 8(2)(b)(iv). To take advantage of the reticence of military planners to run afoul of this legal proscription and of the media attention to the casualties that unintentionally result from counterterrorist operations, terrorists often cite military targets in civilian neighborhoods. MARK LLOYD, SPECIAL FORCES: THE CHANGING FACE OF WARFARE 230 (1995).

> A government suspected of supporting terrorism has only to produce evidence of heavy civilian casualties sustained during a retaliatory raid to divert attention from the initial purpose of that raid [because] . . . such evidence is often enough to convince a shocked and militarily unsophisticated media that . . . the attack was little more than an outrageous atrocity.

Id.; Interview by Cokie Roberts, ABC TV, with Donald Rumsfeld, Secretary of Defense, at ABC Studio (Oct. 28, 2001), *available at* http://www.defenselink.mil/news/Oct2001/t10282001_t1028sd.html ("[Al Qaeda terrorists are] using mosques . . . for command and control, for ammunition storage . . . ."). The possibility—perhaps even the probability—exists that when the United States targets terrorists hiding in the midst of civilian populations, United States ordnance "may kill [innocent civilians] *per accidens*, as an unintentional byproduct of killing the enemy." Cole, *supra* note 4, at 97; *see also* Steven Erlanger, *NATO Powers Accused of War Crimes; Rights Group Says Civilians Targeted in Yugoslavia*, PLAIN DEALER, June 8, 2000, at 5A (reporting description by Ambassador Scheffer of hypothetical scenario wherein a state party to the Rome Statute seeks to indict United States nations when United States bombs accidentally destroy civilian targets and human shields behind whom terrorist are hiding). Indeed, United States operations during Operation Enduring Freedom in Afghanistan have resulted in the deaths of hundreds of civilians. Dexter Filkins, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. TIMES, July 21, 2002, § 1, at 1 (reporting deaths of hundreds of civilians in Oruzgan Province). However, as a matter of policy, the United States makes good-faith efforts beyond those of any other state to avoid civilian casualties in its targeting decisions and it employs significant technological and personal resources to advance the principle of distinction as far as possible. *See, e.g.*, U.S. General Accounting Office, Operation Desert Storm: Evaluation of the Air Campaign, GAO/NSIAD-97-134, at 5.2.2 (1997) (re-force against terrorists.[105] The potential for mischief explains

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quiring pilots to place ordinance in a "particular corner, a vent, or a door" to count as a hit rather than a miss and thus to protect civilian life and property); Emily Eakin, *Ethical War? Do the Good Guys Finish First?*, N.Y. TIMES, Mar. 8, 2003, at B9 (reporting that the great lengths to which the United States Central Command went to avoid accidental collateral damage to civilians actually compromised apprehension of members of al Qaeda); Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, 44 SURVIVAL 7, 7-32 (Spring 2002), *avaiable at* http://www.ssrc.org/sept11/essays/roberts.htm ("[T]here are strong reasons to believe US statements that civilian deaths in [Afghanistan due to the United States bombing] were unintended."). Consequently, United States planners as well as many neutral commentators "blame [terrorists] for the deaths of innocent people they hide among." Cole, *supra* note 4, at 97-98 (elaborating the principle of distinction as understood within the Christian just war theory); *see also* Ken Anderson et al., *A Public Call for International Attention to Legal Obligations of Defending Forces as Well as Attacking Forces to Protect Civilians in Armed Conflict*, CRIMES OF WAR PROJECT, Mar. 19, 2003, *at* http://www.criomesofwar.org/special/Iraq/news-iraq3.html (attributing to defendants rather than attackers the obligation to exclude civilians from military targets and the responsibility for resulting casualties where civilians are not excluded).

[105] The United States accepts limitations on the use of force, imposed under the customary IHL principle of proportionality, in the conduct of military operations. *See* THE LAW OF LAND WARFARE (1956), *supra* note 43, ¶ 41 ("[T]he loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained." (citing revision of 1976)). However, just as the precise meaning of the principle of distinction is contested legal terrain, the definition of proportionality, and the application of the principle to military operations, is the subject of dispute. *See supra* note 44. The injunction not to employ force so as to cause damage "excessive in relation to the concrete and direct military advantage anticipated" suggests to one commentator that the principle of proportionality "favors the option of intentionally killing the head tyrant as a means of ending aggression, rather than sending our young men and women onto the battlefield to slaughter—and be slaughtered by—the tyrant's young men and women." *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1)*, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]; Turner, *supra* note 100, at 800. Others argue that proportionality requires a balancing approach. Shue & Wippman, *supra* note 43, at 574. Still others suggest that in determining the proportionality of attacks against certain infrastructures, one must take into account the "indirect and cumulative effects" of the military action and not merely the direct effects. *Id.* Although the Bush Administration interpreted proportionality to require that strikes against the Taliban military structures and al Qaeda terrorist camps be carefully calibrated, in practice it is impossible to adhere to universally accepted standards of proportionality when employing such devastating weapons systems as cruise missiles, heavy bombers and cluster munitions. *See* Adam Roberts, *The Laws of War in the War on Terror* 7 (unpublished manuscript, on file with author) (stating that the principle of proportionality is in tension with the United States doctrine favoring application

why some brand the ICC a pernicious institution that will grant terrorists moral ablution and invite further evil,[106] and it accounts, in part, for the covert orchestration of much of the war on terror,[107] the better to evade a welter of international

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of overwhelming force in order to achieve decisive victory quickly and with a minimum of casualties). Consequently, there is space to determine a breach of a legal obligation under almost any circumstances. *See* Drumbl, *supra* note 77, at 48 (stating that malleability of the principle of proportionality is "reason[] to be concerned over the . . . incipient legalization of the use of . . . force in response to [terrorist] attacks").

[106] The United States impression of the ICC as antipathetic to United States national security and conducive to malefactors has been well summarized:

> However well-intentioned advocates for the [ICC] may be, the [ICC] represents a significant threat to the national security of the United States and its allies. . . . Since the forces of evil will recognize the deterrent influence of such politically based prosecutions on potential responders, the leaders of these regimes may make entirely rational decisions to commit acts of aggression, knowing they can act without fear of military intervention from foreign forces.

Smidt, *supra* note 40, at 157-58.

[107] Covert operations, also known as "special activities" or "special operations," are a "peculiarly American invention" used by every President since the founding of the United States. *See generally* Melvin A. Goodman, *Espionage and Covert Action*, *in* NATIONAL INSECURITY: U.S. INTELLIGENCE AFTER THE COLD WAR 23-42 (Craig Eisendrath ed., 2000); Statement of Mitchell Rogovin, Special Counsel to the Director of Central Intelligence: Hearings Before the House Select Committee on Intelligence, 94th Cong., 1729, 1731-33 (1976) (detailing long usage of covert operations as United States foreign policy instrument). Such operations are defined in United States law as "activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly." Exec. Order No. 12,333; 46 Fed. Reg. 59, 941, 59,953 (Dec. 4, 1981). Covert operations may lawfully be conducted only by the Central Intelligence Agency or by United States Armed Forces unless the President makes a finding that another agency "is more likely to achieve a particular objective." *Id.* at 49,946. "[Special operations are] conducted by specially organized, trained, and equipped military and paramilitary forces to achieve military, political, economic, or informational objectives by unconventional military means in hostile, denied, or *politically sensitive* areas" and which "requir[e] *clandestive, covert, or low visibility* techniques . . . ." JOINT CHIEFS OF STAFF, DOCTRINE FOR JOINT SPECIAL CHAIRMAN I-1 (1998) (emphasis added). The principal distinguishing feature of covert operations is that, unlike overt applications of force, they are intended to remain secret from the public in order to permit government officials to plausibly deny responsibility for their effects. *See* Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, at 490-91, 94th Cong., 2d Sess., Book I (1976) (citing an early National Security Council document, NSC-4/A (1948)). While the domestic legal regime governing covert opera-

scrutiny[108] waxing unsympathetic to United States purpose.[109]

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tions is beyond the scope of this Article, the President has authority, acting through the National Security Council, to direct the Central Intelligence Agency or the Defense Department to engage in covert operations. *See* National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified in part at 50 U.S.C. § 403(d)(5) (2000)) (authorizing the President to direct the CIA to "perform . . . other functions and duties related to intelligence affecting the national security").

[108] Where the U.N. authorizes a military operation, the relevant Security Council resolution provides the broad mission, political objective and legal authority and creates a quasi-contract between the U.N. and states contributing forces. Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 48 (1996). Although under international law there is no explicit prohibition against covert operations and even if covert operations often result in greatly minimized use of force as compared to overt military interventions, a general presumption against the legality of the use of force exists. *See* U.N. CHARTER art. 2(4) ("All members shall refrain in their international relations from the threat of or use of force . . . ."). While tactical considerations of secrecy and expedience may suggest that a covert operation is more likely to achieve an outcome otherwise achievable by overt force, absent prior authorization by the Security Council, the political costs and the risk of legal exposure attendant to a covert operation increase geometrically. *See* W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 305 n.30 (1992). (suggesting that while covert operations conducted in accordance with IHL may be contributive and supplementary to rather than destructive of international law and order, the inference of lawfulness does not attach to an unauthorized covert operation any more than it does to an unauthorized overt operation); *see also* Jami Melissa Jackson, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669, 713 (1999) (identifying increased international legal intolerance of covert operations across state borders); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 19 (1999) (arguing that neutralization of terrorist targets by covert means does not excite as much condemnation as does an overt military operation due to the opportunity for the plausible deniability by the attacking state and for third parties to more readily ignore the consequences). However, American presidents have jealously defended their rights and claimed duties to employ covert operations when overt military force would carry political and legal risks. *See* Marcus Eyth, *The CIA and Covert Operations: To Disclose or Not to Disclose—That is the Question*, 17 BYU J. PUB. L. 45, 68 (2002); Lloyd Cutler, Counsel to President Carter, Legal Opinion on War Powers Consultation Relative to the Iran Rescue Mission (May 9, 1980), *reprinted in Subcomm. on Int'l Security and Scientific Affairs of the House Comm. on Foreign Aff., War Powers Resolution: Relevant Documents, Correspondence, Reports*, 98th Cong., 1st Sess. 50 (1983) (claiming inherent presidential powers to employ covert operations to rescue United States citizens held hostage where mission success is surprise-dependent (relying upon The Hostage Act, 22 U.S.C. § 1732 (2000) (providing that the "President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release [of United States citizens held hostage"))). Accordingly, to the extent that the United States Executive Branch has been inter-

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ested in the legality of covert operations, attention has been focused upon the domestic, rather than the international, legal issues. Inasmuch as international law is considered in the covert operations context, presidents and commentators have opined that the United States president has the authority, under domestic law, to authorize executive branch officials to violate international law. *See The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International Law: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 3 (1989) (concluding that as a matter of United States law the president can authorize executive officials to conduct covert operations that violate the territorial sovereignty of other states in contravention of customary international law); REISMAN & BAKER, *supra* note 107, at 68 (quoting President Ronald Reagan as saying, "I do believe in the right of a country, when it believes that its interests are best served, to practice covert activity.").

The United States has met significant political and legal resistance in response to the war on terror. In response it has shielded much of its battle plan from public review (and legal attack) and turned to covert operations as its principle weapon. *See* Thom Shanker & James Risen, *Rumsfeld Weighs New Covert Acts by Military Units*, N.Y. TIMES, Aug. 12, 2002, at A1 (reporting that the Department of Defense has issued a classified directive ordering a focus upon employment of United States special forces and CIA paramilitary forces to "disrupt and destroy enemy assets" in states where the local government is unaware of their presence); Thom Shanker, *Jump in Elite Forces' Budget Foreseen*, N.Y. TIMES, Jan. 8, 2003, at A10 (reporting expansion of Special Operations Command and authorization to independently plan and execute counterterrorist operations). Shortly after September 11th, President Bush authorized CIA and Army Special Forces to kill two dozen terrorist leaders—the "worst of the worst"—if capture is "too dangerous or logistically impossible." *CIA Has License to Kill Enemies*, REUTERS (Queensland), Dec. 16, 2002, at A1 (reporting finding as the broadest discretion ever bestowed on CIA to make use of covert operations). While liberal use of covert measures is likely to continue, the Bush Administration has not avoided all legal criticism. For a broader discussion of the consequences of the use of covert operations for the rule of law and political accountability, see Alberto R. Coll, *Unconventional Warfare, Liberal Democracies, and International Order*, *in* LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 67 (Alberto R. Coll et al. eds., 1995).

[109] Very few states have offered more than platitudes in support of the United States-led war on terror, with most either remaining quasi-neutral and some even adopting an obstructionist approach in the U.N. Security Council. One commentator suggests that, for a plethora of resons beyond the scope of this Article, a fundamental rift has opened between the United States and its Western allies over the principles and canons of interpretation that are to guide the application of law to armed conflict in the new millennium. David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, NAT'L INT., Fall 2003, at 57 (stating that with respect to IHL the United States and Europe effectively "can be said to operate under different legal codes"). Although in the immediate aftermath of September 11th NATO invoked the collective defense provisions of the NATO Charter to offer the United States military assistance if necessary, the Alliance has offered little military support to the war on terror. *See* North Atlantic Treaty, Apr. 4,

The foregoing is no veiled attempt to secret national interests within an international rubric: there is a less parochial foundation upon which to reject the fruits of Rome. With their monstrous acts, the nineteen Islamic terrorists who crashed passenger jets into the World Trade Center and the Pentagon may have struck targets physically within the United States, but in so doing they and their organizational and state supporters declared war upon Western civilization.[110] Quite simply, there are no categories of criminality that can contain such acts, and their authors can only be understood as barbarians who have transcended criminality altogether.[111] Accord-

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1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (providing that "an armed attack against one or more [NATO members] . . . shall be considered an attack against them all"); Press Release, NATO Reaffirms Treaty Commitments in Dealing with Terrorist Attacks Against the U.S. (Sept. 12, 2001) (reaffirming commitment to mutual defense under Article 5 of NATO Charter). Similarly, despite a series of proclamations, the U.N. has never demonstrated a firm commitment to eradicating terrorism, and a group of Afro-Asian states have carved out exceptions to language condemning terrorism on the theory that citizens of certain states, in particular the United States and Israel, do not serve immunity on account of the "racist" or "colonial" policies of their governments. *See* U.N. GAOR, 56th Sess., 14th plen mtg., U.N. Doc. GA/9922 (2001) (stating that "[a]cts of pure terrorism, involving attacks against innocent civilian populations should be differentiated from legitimate struggles of peoples under colonial, alien or foreign domination for self-determination and national liberation"). For its part, the Islamic Conference has proposed exempting terrorist acts "related to an armed conflict" from treaties condemning terrorism. Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed*, 41 COLUM. J. TRANSNAT'L L. 573, 581-82 (2003) (referencing legislative history of Draft Comprehensive Convention on Terrorism drafted by ad hoc committee of UNGA). That the United States should be chary of submitting to the legal judgment of states that propagate the canard that "one man's freedom fighter is another man's terrorist" should not be surprising.

[110] *See* DANIEL BENJAMIN & STEVEN SIMON, THE AGE OF SACRED TERROR 36 (2002) (stating that the September 11th attacks were specifically directed, religiously motivated blows against icons of the West).

[111] On September 15th, President George W. Bush made a colloquial reference to the terrorists of September 11th as "barbarians" in public comments urging Americans to return to their normal lives as much as possible but to anticipate possible future attacks. *See* Bob Kemper & Tim Jones, *Bush Warns of Long Fight Ahead*, CHI. TRIB., Sept. 16, 2001, at 1 ("The American people need to go about their business on Monday, but with a heightened sense of awareness that a group of barbarians have declared war on the American people."). This nomenclature has not yet found a formal place in law. However, the equation of terrorists with

ingly, the United States concludes that, after defeating fascism and communism, the free world is once more at war:[112] the Bush Doctrine,[113] disdaining judicial responses for mili-

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barbarians is suitable inasmuch as both are counter-civilizational and both disentitle themselves from the category of rights-bearing subjects by their transgressions against the rights of others. *See* Robert S. Gerstein, *Do Terrorists Have Rights?*, *in* THE MORALITY OF TERRORISM 294 (David C. Rapoport & Yonah Alexander eds., 1982).

> [T]he terrorist . . . not only violates particular rights, he also rejects the principles on which rights rest, and aims at destroying the capacity of the government to protect them. . . . [T]he terrorist is . . . an enemy of rights in general . . . . [T]he terrorist still cannot legitimately expect respect for his claims from those to whom he makes them, for he is exempting himself from the rightless status to which he would relegate all others purely on the basis of his self-appointment . . . .

Id. The reconceptualization of terrorists as modern-day barbarians is indebted to the work of Eric Hobsbawm who, in an influential 1994 essay, opined that an ongoing process marked by "the disruption and breakdown of the systems of rules and moral behaviour by which *all* societies regulate . . . relations" and the erosion of the "*universal* system of . . . rules and standards of moral behaviour, embodied in the institutions of states dedicated to the rational progress of humanity: to Life, Liberty and the Pursuit of Happiness, to Equality, Liberty and Fraterntiy or whatever," was dragging civilization into an abyss wherein a "dangerous classes" of predators "for whom no accepted or effective rules and limits of behaviour exist any longer: not even the accepted rules of violence in a traditional society of macho fighters," would transcend all boundaries of morality in their attacks. *See* Eric Hobsbawm, *Barbarism: A User's Guide*, 206 NEW LEFT REV. 44, 45-53 (1994). Other scholars concur that a new and unlimited species of terrorist, committed not to the traditional goals of revolution or national liberation but to the destruction of civilization, has emerged in the vacuum left by the collapse of bipolarity. *See generally* Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21st Century*, 21 POL. PSYCHOL. 405 (2000) (contrasting "old" terrorism with this deadlier "new" terrorism). For an operationalization of the term "barbarians" as employed in reference to these new terrorists in this Article, see *infra* Part III.

[112] *See* Gross, *supra* note 45, at 523 (suggesting that Islamic terrorism is an existential threat to the "free world", defined as the liberal Western democracies); *see also The Day the World Changed*, ECONOMIST, Sept. 15, 2001, at 13 ("The appalling atrocities of September 11th [are] acts that must be seen as a declaration of war not just on America but on all civilised [sic] people . . . .").

[113] Although others have applied the term more narrowly, the "Bush Doctrine" encompasses the broader transformation of United States policy toward preempting, rather than simply responding to, threats. *See* David E. Sanger, Note, *Bid to Justify a First Strike*, N.Y. TIMES, Sept. 5, 2002, at A1 (labeling as the "Bush Doctrine" the current United States strategy that asserts the right to launch preemptive strikes against any state that could put WMD in the hands of terrorists). *Compare* Benjamin Langille, Note, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L &

tary measures, pronounces unmistakably the American view that the nexus of Islamic terrorism and WMD—a threat to civilization far greater than anything that has yet presented in the framework of traditional understandings of criminality—must be vanquished to "prevent the triumph of an intolerable tyranny."[114]

E. Accommodation: Toward a Rationalized Theory of the Laws of War

By reference to a series of events in the film *Saving Private Ryan*,[115] a fictionalized account of the Allied invasion of Normandy in 1944, and to a hypothetical scenario involving a United States covert operation to eliminate WMD in the custody of terrorists, Part II juxtaposes the two contending paradigms—the code of martial honor, a regime of professional self-regulation rooted in non-legal norms and customs and institutionalized in the system of courts-martial, and the judicial model embodied in the ICC[116]—to illustrate that only the former suppresses violations of IHL while immunizing all but those acts that can be genuinely and universally branded criminal in order to grant soldiers a necessary margin of appreciation in defending against manifestly evil adversaries

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COMP. L. REV. 145, 145-46 (2003) (terming the "Bush Doctrine" the dichotomization of states into supporters of the United States and supporters of terrorism). The Bush Doctrine is thus a major foreign policy redirection from the Clinton Doctrine, which was characterized by the display (as opposed to the use) of military power, casualty avoidance, absolute minimization of collateral damage and "unseemly haste to declare even the most modest use (or threat) of force a roaring success." BARNETT, *supra* note 96, at 130.

[114] The quoted words are drawn from the title of an essay encouraging the United States to abandon neutrality and intervene against Nazi Germany on the ground that to refuse would constitute an immoral act. Reinhold Niebuhr, *If America Is Drawn into the War, Can You, as a Christian, Pariticpate in It or Support It?*, CHRISTIAN CENTURY, Dec. 18, 1940, at 1578.

[115] DreamWorks Studios, 1998.

[116] *See generally* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999) (bifurcating responses to international terrorism into a judicial model, characterized by use of the tools of the criminal justice system and creation of norms to support transnational administration of justce through treaties, and a military model, characterized by the use of force to disable and disrupt terrorists from carrying out their missions).

bent on destroying civilization. Part III will resurrect an ancient taxonomy denoting terrorists as a species of near-rightless outlaws—*barbarians*—with regard to whom the West may place some aspects of IHL in abeyance and drape its military forces and civilian commanders with broad immunities in operations designed to preempt, defeat and destroy these malefactors. Proposals for measures likely to draw law and justice into a closer relationship by rationalizing IHL in support its teleological mission—the protection of the civilization it defends and reflects[117]—will be followed by a Conclusion.

II. SAVING PRIVATE RYAN V. TRYING CAPTAIN RYAN: A FUNCTIONALIST COMPARISON OF THE MARTIAL CODE AND THE ICC IN THE ENFORCEMENT OF IHL

A. *Saving Private Ryan: Martial Honor, War Crimes in World War II and the System of Courts-Martial*

1. Martial Honor

Since ancient times, certain acts committed during war have been widely known to be "manifestly wrongful, on account of their flagrant inconsistency . . . with [the] professional character as an honorable [soldier.]"[118] The medieval code of chivalry, which developed a detailed set of rules and principles for the violation of which one's knighthood could be stripped, further developed this martial code.[119] Knights engaged in a casuistic process of self-reflection and -criticism, as well as collective argumentation, to determine whether particular acts breached this martial code.[120] By the Renaissance, a set of norms,[121] constructed and internalized by a transnational professional caste as an organizational culture requiring, inter alia, minimization of civilian casualties, consistent with military objectives, as a matter not of law but of honor,[122] had perfused warfare.[123] Further, the martial code, by rejecting the alienness and inhumanity of the enemy in favor of a conception of the foe as a fellow professional, directed the honorable soldier to renounce treachery and criminality in combating him,[124] even if these tactics could be otherwise construed as rational methods of war.[125] As the martial code diffused and matured, a collective narrative developed to inform soldiers in the discharge of their duties; when in doubt, soldiers conformed to "stories about the great deeds of honorable soldiers" drawn from the "collective narrative of [their] corps."[126] In short, as a constituent aspect of their professional honor, soldiers accept risks[127] and it is this self-constructed and -imposed commitment, undertaken as the price of membership in a global epistemic community,[128] that upholds shared virtues and a common sociality and inspires adherence to the principles underlying the positive regime of IHL.[129]

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[117] *See* OSIEL, *supra* note 23, at 5 (suggesting IHL has reached the stage whereby it is now constitutive of civilization).

[118] *Id.* at 207.

[119] *See* JOHAN HUIZINGA, HOMO LUDENS 179-80 (Beacon Press 1950) (1944) (identifying compassion, fidelity and justice as essential to the chivalric code); MAURICE HUGH KEEN, NOBLES, KNIGHTS, AND MEN-AT-ARMS IN THE MIDDLE AGES 51-59 (1996) (describing chivalric virtue as graciousness to vanquished foes in recognition of shared membership in an international brotherhood-at-arms); MICHAEL IGNATIEFF, THE WARRIOR'S HONOR 117 (1997) (describing "moral etiquette by which warriors judged themselves . . . worthy of respect"); MERON, HENRY'S WARS, *supra* note 12, at 209 (noting that breach of the chivalric code associated with dishonor, shame and ostracism).

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[120] OSIEL, *supra* note 23, at 17. Medieval Japanese knights called the martial code Bushido. IGNATIEFF, *supra* note 119, at 117.

[121] Norms can be defined as "a set of intersubjective understandings readily apparent to actors that make behavioral claims on those actors." MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 2 n.2 (1996) (explaining that distinct social groups develop, apply and evaluate compliance with parochial normative structures); John M. Levine & Richard L. Moreland, *Progress in Small Group Research*, 41 ANN. REV. PSYCHOL. 585, 585 (1990) (defining norms as "shared expectations about how group members are to behave," the most central of which develop through common group experience over time). For a consructivist account of the evolutionary process of norm generation in social relations, see Ann Florini, *The Evolution of International Norms*, 40 INT'L STUD. Q. 363, 363-89 (1996).

[122] The concept of "honor" is now considered largely an anachronism in civil society but was once a "central construct in . . . socio-political thought and a commonplace in works of law and political philosophy." Allen Z. Hertz, *Honour's Role in the International States' System*, 31 DEN. J. INT'L L. & POL'Y 113, 116 (2002). Although the term is applied in many contexts, most definitions converge around the idea that honor signifies the "esteem, glory, or reverence that a man receives from his fellow men." 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 230 n.1 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1840).

[123] *See* OSIEL, *supra* note 23, at 31-32 ("[Soldiers] ask themselves: 'What is required of honorable soldiers, here and now?' rather than 'What does international law require?' . . . Martial honor 'means doing nothing to tarnish that proud heritage' of one's unit, regiment, or branch of service . . . ."). Under the martial code, a soldier gauges his conduct by asking not whether it was legal but rather "[w]ould [my] actions pass muster if . . . evaluated by responsible, respectable soldiers of yesteryear and today?"). James H. Toner, *Teaching Military Ethics*, MILITARY REV. 33, 37 (1993).

[124] BEST, *supra* note 20, at 290. In essence, the martial code fosters empathy for fellow martial professionals. Diane Guillemette, *Legal Advisers in Armed Forces*, *in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 133, 144 (Fritskalshoven & Yves Sandoz eds., 1989).

[125] *See generally* FRIEDRICH KRATOCHWIL, RULES, NORMS, AND DECISIONS (1989)

(describing process whereby regimes, a designation inclusive of martial honor, deploy normative constraints to fortify socially optimal solutions against the temptation of an individual to make rational decisions); J.G. MARCH, DECISION REGIMES ix (1994) (describing process whereby the normative force of institutional customs and traditions socializes and determines individual preferences and directs members not explainable by reference to their rational self-interest defined in terms of wealth or even physical security).

[126] MARCH, *supra* note 125, at 21. This narrative identity is conferred largely by anecdotal reference to an accreting stock of stories that detail how heroic soldiers behaved in combat, particularly with regard to the avoidance of the infliction of unnecessary suffering. *Id.*

[127] *See* Order of General Douglas MacArthur Confirming the Death Sentence of General Tomayuki Yamashita (Feb. 16, 1946) ("The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits—sacrifice."); *see also* ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 92 (1981) ("[S]oldiers are brought up to risk almost certain death rather than fail in their duty . . . even though there is no compensating chance of personal gain.").

[128] *See* Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1783 (2003) (describing national military establishments as global epistemic community that adheres to prescriptive norms of conduct); Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining "epistemic community" as a "network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain" as well as to a set of shared norms and practices to guide self-regulation).

[129] RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 5 (1983) (suggesting restraint in combat "d(oes) not stem from a conscious articulation of principles of [IHL] so much as from a kind of soldier's honor"); JEFFREY LEGRO, COOPERATION UNDER FIRE: ANGLO-GERMAN RESTRAINT DURING WORLD WAR II 2 (1995) (developing "organizational-cultural" theory of transnational cooperation and identifying the collective understanding of "how soldiers thought about themselves, perceived the world, formulated plans, advised leaders, and went into action"—in

Admittedly, revenge, fear and other intractable instincts tapped by the horror of war can be overwhelming. When discipline disintegrates and darker angels of human nature overcome them, some soldiers—no less fallible creatures than their civilian counterparts—do indeed descend into inhumanity. However, their failure to abide by the martial code, which reflects endogenous norms and imposes a more stringent standard of conduct than that demanded by IHL,[130] strips wayward members of an incalculable value—their status and identity within the martial caste.[131] When the threat of professional banishment fails to secure compliance with this strict normocentric behavioral template, the martial code subjects transgressors to courts-martial[132] and the unit(s) re-

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other words, the martial code—as the explanation for adherence to behavioral norms); MERON, HENRY'S WARS, *supra* note 12, at 216 ("Honour and mercy . . . formed potent forces for civilized behaviour in time of war.").

[130] Much of the language codified as IHL represents the lowest common denominator of what states parties were willing to accept, and thus the prohibitive regime is less stringent than the martial code. *See* OSIEL, *supra* note 23, at 32 (suggesting that while IHL establishes "a 'floor' beneath which no soldier may descend," the "most effective soldiering, the sort that wins medals (and battles) is . . . 'supererogatory,' requiring the acceptance of risk . . . 'beyond the call of duty'").

[131] Social control theorists note that private groups exert far more control over members' behavior, through internal enculturation, than externally imposed rules. JON ELSTER, THE CEMENT OF SOCIETY 15 (1989) (demonstrating importance of endogenous nonlegal normative systems in regulating social organizations); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 22-23 (1990) (discussing related theories); YAACOV Y.I. VERTZBERGER, THE WORLD IN THEIR MINDS 195-96 (1990) (describing process whereby group membership creates a "cognitive mediation role" by providing members a normative "benchmark and a sense of [normative] direction for coping with . . . their complex environment"); ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY 22 (1979) (identifying internal social pressures operant within social groups as powerful source of inducement toward compliance with norms); Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 384-85 (1994) (positing corporate structures organized around internal normative systems as crucial to construction and regulation of international relations). *See generally* Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 L. & SOC'Y REV. 837 (1990) (examining role of social groups in creating legal norms and mobilizing the desire for peer respect and affiliation as security against violation of those rules of member conduct). *See generally* Haas, *supra* note 128 (describing compliance pull generated by the inculcation of group norms within transnational professional networks).

[132] The "court-martial" is a domestic military court with jurisdiction to try

sponsible to reprisals;[133] each institutionalized regime brings internal standards of judgment to bear and can impose, as appropriate to specific delicts, sanctions as serious as death. The propinquity of an accused to the peers called to judge him is simply not proof against obloquy, castigation and excommunication if he has failed to idealize the martial code.

However, although courts-martial and reprisals inflict harsh punishment upon dishonorable members of the martial caste, at the same time these self-policing regimes are intrinsically disposed to the holistic examination of the wide welter of circumstances that characterize the combat environment. Whereas many IHL proponents would impose a duty upon soldiers to utterly abjure self-preservation in obeisance to absolute legal prohibitions on the killing or destruction of certain classes of persons and things,[134] courts-martial, more pragmatic forums, reserve judgment to other military personnel who, by virtue of their own experience, are able to discern the extent to which defenses, such as those grounded in military necessity, ought to be considered in immunization against liability or in mitigation or extenuation of guilt.[135] The de-

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offenses against military order and discipline as well as against the laws and customs of war. *See infra* note 283 (discussing United States court-martial in depth).

[133] "Reprisal" is an act of retaliation undertaken to induce enemy forces to cease violating IHL. *See generally* KALSHOVEN, *supra* note 28. When undertaken absent a prior enemy violation, reprisal would violate IHL, but when undertaken to force an adversary to cease violating IHL it becomes legal provided it is proportional, temporary and preceded by notice. *Id.* Reprisals, or the threat thereof, alter the decision matrix of soldiers. The resort, or threatened resort, to mechanisms built upon the principle reciprocity to prevent defections from behavioral norms is common practice within social groups constructed on the basis of kinship, religion and professional status. *See, e.g.*, George Dalton, *Traditional Production in Primitive African Economies*, *in* TRIBAL AND PEASANT ECONOMIES 61-80 (George Dalton ed., 1967).

[134] *See* WALZER, *supra* note 12, at 305 (claiming IHL establishes an absolute rule that "self-preservation . . . is not an excuse for violations of the rules of war").

[135] *See* Telephone Interview with LTC Mark Martins, Deputy SJA, XVIIIth Airborne Corps (Oct. 2, 2000) (noting that at a court-martial proceeding an accused is permitted trial before a jury of military peers who are charged with determining whether extenuating or mitigating circumstances such as "heat of passion, lack of sleep or food, [or] extremity of the circumstances" should be permitted as partial or complete defenses or factors to be considered in reduction of sentenc-

cision to inflict reprisal requires the responsible military commander to undertake a similar analysis to determine whether the enemy act could reasonably be justified by military necessity, judge any potential claims that the act did not trammel upon martial honor and evaluate the utility of reciprocal violations in deterring future such enemy acts. In sum, martial honor demands even more of soldiers than laws established by outsiders to regulate them, and a rigid yet informal transnational regime vigorously enforces this code upon the ultimate pains of professional banishment and death. However, in accepting that soldiers have an instinct, a right and a duty to self-preservation that no law can abridge or even regulate in any meaningful way, martial honor deviates from IHL absolutism in a sense so profound it is difficult to overstate.[136] Still, few honest observers adjudge martial honor wanting with respect to its capacity to preserve humanity in war while successfully defending civilization.

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ing); *see also* TAYLOR, *supra* note 13, at 36.

> [C]ircumstances arise where military necessity, or even something less, causes [the rules] to be disregarded. In the heat of combat, soldiers who are frightened, angered, shocked at the death of comrades, and fearful of treacherous attacks by enemies feigning death or surrender, are often prone to kill rather than capture.

Id.

[136] According to Professor Fisher,

> Basic perceptions of the world, of what is right and wrong, of what is desirable and of what is undesirable, are shaped primarily for any given [institution] by considerations other than the law. Family, schools, cultural attitudes, and the implicit assumptions of any society are subject to change, but not primarily through legal tinkering.

FISHER, *supra* note 127, at 143.

As this Article will demonstrate, the martial code, built upon a set of non-legal normative understandings and values, is at its core a non-legal regime not generally tractable by traditional legal pressures, particularly when exerted by outsiders who do not share the normative commitments that animate the regime of military self-regulation. For an argument that non-legal sources of normative prescription regarding "what is right and good for human life" that precede attempts at positive legal regulation are more effective, at least in international relations, in securing compliance with behavioral objectives, see generally Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946 (1990).

2. Saving Private Ryan

On the morning of June 6, 1944, the first of one million Allied forces under the supreme command of General Dwight Eisenhower invaded Nazi-occupied Europe, with initial landings upon a series of code-named beaches in the Normandy region of France. Among other United States formations spearheading Operation Overlord against fierce German resistance was the 75th Ranger Regiment.

The film *Saving Private Ryan* opens with C Company of the 2nd Battalion, 116th Infantry Regiment, 29th Infantry Division, already under fire from shore batteries, preparing to disembark from their landing craft and storm Dog Green sector of Omaha Beach. The maelstrom of shot and shell obliterates much of the first wave, including most of C Company, and their commander, Captain John Miller, aware that the success of the invasion hangs in the balance, orders the shocked survivors, pinned by withering machine gun fire and flak behind tank obstacles at water's edge, to advance. Men disintegrate in puffs of warm crimson mist as C Company drags forward and redeploys behind a natural berm strewn with pieces of their buddies. With casualties mounting at an incredible rate, Captain Miller orders his troops to advance through a draw and eliminate fortifications atop the bluffs above Omaha so additional forces can be ushered ashore. Murderous machine gun fire rakes C Company during its struggle up the heights, but as C Company and its sister companies turn the tide, the German infantry in the fortifications atop the bluffs throw down their weapons in surrender. Rather than accept surrenders, however, C Company, its members enraged at the mass slaughter of so many Americans, mows down the lines of now-defenseless Germans as Captain Miller and his first sergeant silently observe. Although the battle yet rages along the invasion beaches, Dog Green is quiet as Captain Miller surveys the beach below, carpeted with the bodies of the 2nd Battalion, his shaking hands betraying unspoken emotions.

Several days later, after he reports to his battalion commander the intelligence gathered from an engagement between the remnants of C Company and an entrenched German flak unit defending the German withdrawal across Normandy, Captain Miller is ordered to select and lead a squad on what is described as a mission of strategic importance, the objective of which is the location and evacuation of Private James S. Ryan. The Chief of Staff of the Army, General George C. Marshall, upon learning of the combat death of Private Ryan's three brothers in other theaters, has determined that the injury to national morale would be too great were Ryan's mother to lose all four sons in battle, and he orders Private Ryan hastened to immediate safety.[137] Captain Miller selects a squad of seven and sets out for the last known location of Private Ryan, a town deep behind enemy lines.

After a day's march, the squad advances upon a machine gun nest at the base of a destroyed radar installation that has been hastily emplaced to delay United States forces pursuing the German retreat. Against the advice of his men, who counsel the bypass of the position, Captain Miller, reasoning that, despite the importance of his strategic mission, follow-on forces will be forced to eliminate the machine gun nest if his men do not, orders a modified frontal assault that results in the second death within his squad. After the sole surviving machine gunner[138] is captured, Captain Miller permits his troops to beat and otherwise abuse the terrified, desperate German prisoner of war (POW) for several minutes while he ponders a course of action, his hands once again shaking with the gravity of the situation and the depths of his internal anguish. One member of the squad, Private First Class (PFC) Reiben, argues vehemently that the POW should be executed, insisting that to release him will result in his rejoining his unit and revealing the existence of the mission to the Germans, who will recognize the strategic nature of the mission and initiate a hunt for the squad, whereas to take the POW along will encumber and compromise the success of the mission. Captain Miller finally determines that the POW will be blindfolded and released upon his promise to surrender himself to the first Allied patrol he encounters. The parolee, madly repeating the words to American movies, deriding Hitler, and attempting to sing the United States national anthem the better to prove his love for the United States and his hatred for Nazism, steps briskly into the distance. When PFC Reiben quarrels directly with Captain Miller, Sergeant Horvath takes him to task for his insubordination, and the two nearly come to blows before Captain Miller reorients the unit to the search for Private Ryan.

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[137] Private Fritz Niland of the 101st Airborne Division was removed from the European Theater of Operations by order of the War Department in June 1944 after it was discovered that all three of his brothers were killed in action in a single week. *See* STEPHEN E. AMBROSE, BAND OF BROTHERS 103 (1992).

[138] In the film, the character is referred to simply as "Steamboat Willie," so named for his desperate recitation of all the sound bites from American culture that he can recall, one of which is the Disney cartoon by that title. SAVING PRIVATE RYAN (Paramount Pictures 1998).

Private Ryan is located in the village of Ramelle with a subordinate unit of the 101st Airborne Division defending a bridgehead, and, after he refuses to accompany the rescue squad until the German armored counterattack against his position is defeated, the units are integrated in defense. During the pitched battle, in which United States forces absorb heavy losses but hold the position until Allied air patrols destroy the bridge, the paroled German machine gunner, who has rejoined his SS unit, kills a member of the squad in hand-to-hand combat and shoots Captain Miller. Reinforcements arrive on the heels of close air support, and a group of German attackers throw down their weapons and surrender to Technical Sergeant (T/5) Upham, a German linguist and intelligence analyst who has emerged from the building wherein he cowered for much of the battle. Although Upham has leveled his rifle at the Germans, the paroled machine gunner, recognizing Upham for the timid soul he is and hoping to rattle him, calls him by name and derisively informs him in German, loudly so the others can hear, that he is "no soldier." Upham hesitates only a second before shooting the paroled machine gunner, after which he gruffly tells the other German detainees to "scatter." They do so, and the sole survivors, PFC Reiben, T/5 Upham and Private Ryan, gather around the dying Captain Miller, whose final words challenge Private Ryan to live his life so as to earn the sacrifices of the men who died so he might live. In the final scene, Private Ryan, now an aging grandfather surrounded by his extended family, pays his respects at the gravesite of Captain Miller in the American Military Cemetery atop the bluffs overlooking Omaha Beach and, as the film concludes, it is clear that Private Ryan has indeed done everything he could to merit the valor of his fallen comrades and that their sacrifice, made to rid the world of the great evil of Nazism, was not in vain.

3. War Crimes in Private Ryan?

a. Denial of Quarter

i. Antiquity

The earliest recorded history of war indicates that the killing of POWs rendered *hors de combat*[139] was common. The denial of quarter—refusal to grant clemency to combatants no longer capable of offering resistance by virtue of wounds or other disability[140]—is one of the most ancient and enduring practices of warfare, conducted by the Greeks, Romans and others for whom "war, naked and unashamed, kn[ew] of no right but the right to kill."[141] For the ancients war was an intercommunal effort bereft of rules or mercy: victory and defeat were absolutes, and all categories of persons and property were legitimate targets.[142] POWs were killed or enslaved out of enmity,[143] with a preference for the former,[144] and soldiers who refused to crucify, mutilate, drown or torture their captives to death[145] could be punished as moral reprobates for having committed, in effect, war crimes.[146] Dead POWs were not necessarily beyond insult: some cultures killed their captives for food.[147] Although a minority view counseled mercy,[148] ancient practice ran strongly in favor of a norm in which the lives of POWs and civilians were forfeit to the captor and their dispatch was acceptable moral conduct.[149]

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[139] *Hors de combat* is a legal term of art drawn from the French and signifying that an individual has been rendered "out of combat" and thus is no longer a combatant. *See* API, *supra* note 105, art. 40 (defining *hors de combat* as including those "in the power of an adverse party"; those who clearly express "an intention to surrender"; and those who have been "rendered unconscious or otherwise incapacitated by wounds or sickness" and are therefore incapable of defending themselves).

[140] To conserve space, the analysis of denial of quarter does not distinguish between the refusal to accept surrender and the slaughter of POWs whose surrender has already been accepted, although this distinction is relevant to the evaluation of the conduct of Captain Miller's troops on the bluffs above Omaha Beach. *See* MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 575-76 (1994) ("[I]n case of close and sustained combat in land war, where the signal of surrender is postponed and resistance continued to the very last moment, quarter may in practice be difficult to grant . . . . Determination of the particular time when further violence becomes nonpermissible is thus a matter of rough practical judgment.").

[141] SPAIGHT, *supra* note 17, at 3.

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[142] *See* 2 COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 234-38 (1911) (stating that in ancient times extermination, sacrifice of prisoners to the gods, slavery, mutilation of corposes and refusal of mercy to the old and sickly were usual practices); Howard S. Levie, *Humanitarian Law and the Law of War on Land*, *in* INTERNATIONAL HUMANITARIAN LAW: ORIGINS 181 (John Carey et al. eds., 2003) ("From the caveman to Biblical times, and for centuries thereafter, the winner in battle took from the loser not only his life, but also all of his available belongings, including women, children, domestic animals, and personal property." (citing *Numbers* 31:7-11)).

[143] *See* I *Samuel* 15:3 (instructing Saul to "go and smite Am'a-lek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass"); HERBERT C. FOOKS, PRISONERS OF WAR 8 (1924) (noting that the Roman general Germanicus urged his legions invading the Rhineland to "[s]lay, and slay on, do not take prisoners; we shall only have peace by the complete destruction of the nation" (citing TACITUS, ANNALS bk II, ch. 21)); PLATO, *The Rules of War*, *in* THE REPUBLIC bk V, § 3, at 226 (H.D.P. Lee trans., 1955) (citing Socrates as stating that "any . . . taken prisoner should be abandoned to his captors to deal with as they wish"); THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR bk. I, ch. 50 (Rex Warner trans., 1954) ("[The Corinthians] sailed in and out of the wreckage, killing rather than taking prisoners.").

[144] SECRETARY OF DEFENSE ADVISORY COMMITTEE ON PRISONERS OF WAR, POW: THE FIGHT CONTINUES AFTER THE BATTLE 3 (1955) [hereinafter SDACPOW].

[145] FOOKS, *supra* note 143, at 16, 118-19 (listing methods of execution of POWs used by ancient Assyrians, Greeks and Romans).

[146] *See* JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 263 (1974) (indicating that killing prisoners of war was "practically mandatory under contemporary notions of morality" at the time of the Old Testament); FOOKS, *supra* note 143, at 7-8 (citing the exile of the Syracusan general Hemocratus for the crime of ordering his troops to treat Athenian prisoners with moderation rather than death); *id.* at 7 (stating that many ancient nations regarded moderation in the treatment of prisoners of war as a religious offense).

[147] FOOKS, *supra* note 143, at 8.

[148] *See, e.g.*, 1 CICERO, DE OFFICIIS 11 (1814) ("The conquered have a right to our respect as well as those who have surrendered themselves."); FOOKS, *supra* note 143, at 119 (noting that the ancient Greek Zenophon asserted that POWs

ii. Middle Ages: 1000 A.D.—1648 A.D.

Although the medieval code of chivalry directed knights to extend certain reciprocal rights and privileges in combat, including the right of quarter[150] to surrendering foes upon the payment of ransom,[151] military necessity justified the denial of quarter even to nobility where capitulants might subsequently pose a threat were the tide of battle to turn[152] or

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should treated humanely, and that the Roman Sallust declared that the laws of war would not permit the killing of Numidian prisoners taken during the Punic Wars); OSIEL, *supra* note 23, at 176-77 (indicating that, following the surrender of the Spanish city of Locha in 203 B.C., the Roman commander Scipio Aemilianus punished his troops who had refused to give quarter and publicly apologized for their conduct); SUN TZU, ON THE ART OF WAR 16 (Lionel Giles trans., 1910) (suggesting that it may be more efficacious to accept surrenders rather than kill prisoners). *See generally* BLUNTSCHLI, *supra* note 6 (stating that some Hindu tribes adhered to the code of Manou, which proscribed killing POWs).

[149] Although considerations of military necessity per se did not directly enter into the moral calculus of the ancients with respect to any duties owed POWs, the logistical requirements of maintaining them did in fact militate in favor of their swift dispatch. *See generally* E. BODIAN, FROM PLATAEA TO POTIDAEA: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF THE PENTECONTAETIA (1993).

[150] "Quarter" refers to the acceptance of the surrender of the defeated foe. *See id.* at 113 (noting the origin of the term in a seventeenth century war between Spain and the Netherlands in which the parties made a regulation that they would spare the lives of POWs upon payment of a ransom equal to one-fourth of their annual salaries and that captives for whom no such payment was made would be killed). To make the declaration of no quarter was to inform an enemy that surrender would be neither requested nor granted and that combat would continue until the death of the last enemy soldier or until the attacker decided to cease operations.

[151] *See* CHRISTINE DE PISAN, THE BOOK OF FAYTTES OF ARMES AND OF CHYVALRYE 184 (A.T.P. Byles ed., William Caxton trans., 1932) (1489) (noting that the medieval laws of war and customs of chivalry suggested that prisoners of war ought to be spared in exchange for ransom).

[152] *See* HONORE' BONET, THE TREE OF BATTLES (G.W. Coopland trans., Harvard University 1949) (1387) ("He who in battle has captured his enemy, especially if it be the duke or marshal of the battle . . . should have mercy on him, unless by his deliverance there is danger of having greater wars . . . ."); MAURICE KEEN, CHIVALRY 276 & n.7 (1984) (noting that during medieval combat, killing POWs in emergencies was permitted and quarter was not invariably given); GIOVANNI DA LEGNANO DE BELLO, DE REPRESALIIS ET DE DUELLO ch. 30, at 253-54 (Thomas

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Erskine Holland ed., J.L. Brierly trans., Oceana Publications 1964) (1383)) ("[Q]uarter should be granted to one who humbles himself and does not try to resist, unless the grant of quarter gives reason for fearing a disturbance of the peace, in which case he must suffer . . . . [Q]uarter is to be granted only when disturbance of the peace is not feared, and otherwise not."); PISAN, supra note 151, at 222 (stating, in a 1408 compilation of the medieval customs of war that, although it is expected that Christian soldiers will extend to each other the grant of quarter as a principle of their humanity, prisoners who would otherwise endanger their captor may be killed); 6 FRANCISCUS DE VICTORIA, DE INDIS ET DE IVRE BELLI REFLECTIONS 183 (Ernest Nys ed., John Pawley Bate trans., Carnegie 1917) (1577) ("Speaking absolutely, there is [no law] to prevent the killing of those who have surrendered or been captured in a just war so long as abstract equity is observed, [although] after victory has been won . . . and all danger is over, [they] are not to be killed."). The most discussed denial of quarter necessity occurred in 1415 when troops under the command of the English King Henry V, invading France at the beginning of the Hundred Years' War, killed French prisoners during the Battle of Agincourt. Although a majority supports the argument that military necessity was a complete justification for the denial of quarter, commentators are divided as to whether Henry, his forces outnumbered and convinced that French cavalry reserves were about to be committed to battle, had a legitimate claim of military necessity in ordering the execution of enemy prisoners to prevent their liberation and resumption of combat operations against the English. *See* RICHARD CROMPTON, THE MANSION OF MAGNAMITIE ch. 6 (Theatrum orbis Terrarum, Ltd. 1975) (1399).

> [U]ppon such necessary occasion, to kill them was a thing by all reason allowed, for otherwise the king having lost diverse valiant Captaines and souldiers in this battell, and being also but a small number in comparison of the French kings army & in a strang countrey, where he could not supply his neede upon the sudden, it might have bene much daungerous to have againe joyned with the enemy, and kept his prisoners alive, as in our Chronicles largely appeareth.

Id. (cited in MERON, HENRY'S WARS, *supra* note 12, at 166-67); *see also* 1 WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES 401-08 (1956) (justifying Henry's order to kill POWs on ground of necessity); RAPHAEL HOLINSHED, *Henry V*, *in* HOLINSHED'S CHRONICLES 38 (R.S. Wallace & Alma Hansen eds., 1923) (1587) (holding that although the killings were undertaken "contrarie to his accustomed gentleness" and "incontinentlie" they were permissible under custom); HAROLD F. HUTCHISON, KING HENRY V 124 (1967) (stating that "[b]y medieval standards Henry was obeying his soldier creed—military necessity justified any butchery"); HARRIS NICOLAS, A HISTORY OF THE BATTLE OF AGINCORT 124 (2d ed. 1832) (arguing that "imperative necessity" justified the order); WILLIAM SHAKESPEARE, HENRY V act IV, sc. vi (suggesting that he did). *But see* 2 PIERINO BELLI, DE RE MILITARI ET BELLO TRACTATUS 40-41 (James Brown Scott ed., Herbert C. Nutting trans., Carnegie 1936) (1563) (condemning killing of POWs as a "practice most abominable"); 2 ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 211-12 (James Brown Scott ed., John C. Rolfe trans., Carnegie 1933) (1598) (describing denial of quarter to soldiers who "threw down their arms on the ground . . . [as a grave] crime" and rejecting justification by necessity); DESMOND SEWARD, HENRY V where the execution of POWs would demoralize the enemy and aid in victory.[153] Moreover, common soldiers and civilians were not subjects of the *jus armorum* and, despite the growing influence of the Church,[154] most commentators proclaimed support for the general right of a captor to kill all common soldiers,[155] as well as residents of enemy territory who had borne arms or mustered support for the war effort, as enemies of the state.[156] Practice followed this restatement of customary right: throughout the Middle Ages belligerents routinely dispatched POWs,[157] particularly in the context of the "untrammeled savagery"[158] of inter-confessional conflicts, and entire populations of cities were put to the sword in fits of

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81 (1987) ("[B]y fifteenth-century standards, to massacre captive, unarmed noblemen who, according to the universally recognized international laws of chivalry, had every reason to expect to be ransomed if they surrendered . . . was a peculiarly nasty crime . . . .").

[153] *See* FRANCISCO SUAREZ, *Disputation XIII: On Charity*, *in* 2 SELECTIONS FROM THREE WORKS 841 (Jams Brown Scott ed., Gwladys L. Williams et al. trans., Oceana 1944) (1621) (stating that slaughter of POWs may be necessary to terrify the adversary).

[154] *See* WILLIAM E.S. FLORY, PRISONERS OF WAR 13 (1942) (discussing early efforts by the Christian Church to improve the treatment of prisoners of war by appeals to the "equality and brotherhood" of man); FOOKS, *supra* note 143, at 10 (describing influence of Christianity in promoting a custom to allow prisoners to pay a ransom in exchange for their liberation).

[155] *See* 3 HUGO GROTIUS, LE DROIT DE LA GUERRE ET DE LA PAIX ch. 5 (Universite de Caen 1957) (1645) [hereinafter GROTIUS, LA PAIX] (stating that enemies captured in war, as well as their descendants in perpetuity, are the property of the captor to dispose of as he should so choose); *see also* 3 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES ch 4, § 10 (James Brown Scott ed., Francis W. Kelsey trans., Carnegie 1964) (1625) [hereinafter GROTIUS, LIBRI TRES] ("So far as the law of nations is concerned, the right of killing . . . captives taken in war, is not precluded at any time . . . .").

[156] *See* 3 GROTIUS, LA PAIX, *supra* note 155, ch. 5 (approving the killing of every inhabitant of a town that refused the request to surrender); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 474 n.2 (8th ed. 1924) ("Quarter was not given to the garrison of a place which resisted an attack from an overwhelming force, which held out against artillery in absence of sufficient fortifications, or which compelled the besiegers to deliver an assault.").

[157] *See, e.g.*, MERON, HENRY'S WARS, *supra* note 12, at 109 (reporting that, prior to the English denial of quarter at the Battle of Agincourt, the French leaked their intention to grant quarter only to English nobles and to amputate the right hand of every English archer).

[158] SDACPOW, *supra* note 144, at 3-4.

religious cleansing.[159] Conflict beyond Christendom was even more brutal: Islamic practice condoned execution of Christian POWs who refused to convert[160] while Christian crusaders reflexively denied quarter to Muslims,[161] to the approval of leading jurists.[162] Although merciful captors occasionally granted their captives the status of protected persons,[163] savagery reigned during the Dark Ages, and it was not until the dawning of the Enlightenment that chivalry began to embrace common soldiers and civilians within its normative and protective fold.

iii. Enlightenment: 1648 A.D.—1800 A.D.

The humanitarian conception of the soldier rendered *hors de combat* as an unfortunate wretch with a claim to protection against mistreatment,[164] rather than an enemy of the state deserving of death, acquired some purchase in the seventeenth century, inspired largely by the writings of Enlightenment scholars who labored for the humanization of war.[165] The development of secular international law subsequent to the Treaty of Westphalia in 1648 bolstered this development as POWs came incrementally to be viewed as wards of the custodial sovereign rather than as the prizes of the capturing soldier[166] and, by the eighteenth century, although they could be confined and even sold into slavery[167] to prevent their rejoining the fray,[168] POWs were no longer reflexively put to death. State practice gradually incorporated principles of restraint codified in domestic military regulations[169] and bilateral agreements requiring that enemy POWs be granted quarter[170] and, during the American Revolution, a weak customary regime of exchange permitted the parole[171] of officers upon their promise to refrain from future participation in the conflict. Common soldiers could hope for release without ransom at the termination of hostilities.[172] However, the prac-

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[159] *See generally* WILLIAM P. GUTHRIE, THE LATER THIRTY YEARS WAR: FROM THE BATTLE OF WITTSTOCK TO THE TREATY OF WESTPHALIA (2003) (describing the common practice during European religious wars of killing all residents of captured cities, such as Heidelberg, Magdeburg and Kempten).

[160] *See* Green, *supra* note 99, at 289 (citing ninth century Islamic code distinguishing Muslim from non-Muslim POWs and permitting killing of latter provided the offer of conversion was rejected). Some scholars indicate that in practice Muslim captors would release non-Muslim POWs provided the parolees had not committed precapture crimes and pledged, upon their release, to teach illiterate Muslims to read and write. Bennoune, *supra* note 12, at 634 (discussing alternate dispositions of non-Muslim POWs).

[161] FLORY, *supra* note 154, at 13.

[162] *See, e.g.*, VICTORIA, *supra* note 152, at §§ 44-48 (holding that the refusal to take Muslim prisoners, and the execution of the same, was ipso facto a matter of military necessity).

[163] *See, e.g.*, Green, *supra* note 99, at 290 (noting that after the Siege of Limoges (1370) the English knights John of Gaunt and the Earle of Cambridge, moved to mercy by the pleas of French captives, countermanded orders denying quarter).

[164] A.J. BARKER, PRISONERS OF WAR 6 (1975).

[165] *See* G.F. DE MARTENS, PRECIS DU DROIT DES GENS MODERNE DE L'EUROPE bk. VII, ch. 4, at 272 (1858) (holding that POWs were entitled to quarter except in reprisal for denial of quarter on their own part); MONTESQUIEU, DE L'ES ESPRIT DES LOIS bk. 15, ch. 11, at 242 (Thomas Nugent trans., 1900) (1748) (stating that soldiers rendered hors de combat were entitled to be spared from further

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injury); 2 JOHANN WOLFGANG TEXTOR, SYNOPSIS OF THE LAW OF NATIONS ch. XVIII, paras. 17-19 (Ludwig von Bar ed., John Pawley Bate trans., Carnegie 1916) (denying the right of a captor to kill a POW rendered harmless and distinguishing between categories of former enemies who had promoted the war and willingly taken up arms from those who were forcibly conscripted); EMMERICH VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE bk. III, ch. VIII, paras. 140-141, 151 (James Brown Scott ed., George D. Gregory trans., Carnegie 1902) (1758) (commenting that the moment a soldier surrendered, he was under the protection of his captor and could not be killed unless he had committed a pre-capture crime justifying reprisal and death); CHRISTIAN WOLFF, THE LAW OF NATIONS ch. XVIII, § 797, at 412 (Joseph H. Deake trans., Oxford 1934) (1734) ("Since once ceases to be an enemy as soon as he is in my power, . . . it is not allowable to kill those who have been surrendered unconditionally.").

[166] SDACPOW, *supra* note 144, at 4.

[167] *See* 3 GROTIUS, LIBRI TRES, *supra* note 156, ch. 14, § 9; ARMAND DU PAYRAT, LE PRISONNIER DE GUERRE DANS LA GUERRE CONTINENTALE 15 (1910) (declaring that a conqueror might spare the life of a prisoner upon his promise to accept enslavement (citing PUFFENDORF, LE DROIT DE LA NATURE ET DES GENS bk. VI, ch. 3, bk. VIII, ch. 6)).

[168] Howard S. Levie, *Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War*, 7 USAFA J. LEGAL STUD. 37, 37 (1996-97).

[169] *See* Laws and Ordinances of Warre, Established for the better Conduct of the Army (1643) ("None shall kill an enemy who yeelds, and throws down his Arms . . . upon pain of death.").

[170] *See, e.g.*, Treaty of Amity and Commerce, Sept. 10, 1785, U.S.-Prussia, 8 Stat. 84 (obligating parties to provide reciprocal humane treatment, including quarter, to prisoners of war).

[171] *See infra* note 240 and accompanying text (discussing the concept of "parole").

[172] Although this customary regime did ameliorate the treatment of some cap-

tice of denying quarter out of military necessity continued despite the fitful emergence of a protean custom,[173] and a majority of scholars conceded that, as a matter of law, a surrendering enemy was stripped of all rights, including the right to quarter,[174] and that any formal legal claims to protection at the hands of the enemy were moral, rather than legal. As such, the POW could be, and often was, summarily killed.[175]

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tured personnel and the parole of a great many officers, the exceptions nearly swallowed the rule, and the British in particular committed major violations of the tacit agreement to treat POWs with humanity. *See* B. TARLETON, A HISTORY OF THE CAMPAIGNS OF 1780 AND 1781 IN THE SOUTHERN PROVINCES OF NORTH AMERICA 30-32 (1968) (chronicling British violations of the emerging custom that required humane treatment of POWs, such as the confinement of Ethan Allen in irons on a prison ship and the refusal to grant quarter at the Battles of Waxhaws and Fort Griswold). Compliance with what remained of the regime was secured not through any sense of legal or professional obligation but largely through threat of reprisal, as commanders whose captured troops were threatened with execution resorted to reciprocal threats against enemy prisoners of war in their own custody to protect their own personnel. *See* George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 185, 191-92 (1978) (discussing the treatment of POWs during the American Revolution).

[173] *See, e.g.*, Coil, *supra* note 172, at 182-84 (noting that British commanders during the Revolution justified the denial of quarter to American troops on the grounds that Americans had made perfidious surrender, *see infra* note 208 discussing perfidy, that British troops were so enraged that they could not be expected to have restrained themselves sufficiently to accept prisoners, that ongoing resistance on other parts of the battlefield made it impossible to safely accept prisoners and that the British officer corps had been so decimated that there was no functioning chain of command capable of issuing orders to restrain British enlisted soldiers from dispatching American prisoners). Almost without exception, international law scholars expressly approved of a military necessity exception to an emerging custom entitling surrendering soldiers to quarter. *See, e.g.*, MONTESQUIEU, *supra* note 165, bk. 12, chap. 3; TEXTOR, *supra* note 165, ch. XVIII, paras. 17-19.

[174] *See* MONTESQUIEU, *supra* note 165, bk. 12, ch. 3 (supporting the argument that extermination of prisoners of war conformed with positive international law); CORNELIUS VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO 16 (James Brown Scott ed., Tenney Frank trans., Carnegie 1930) (1737) ("[E]very force is lawful in war. So true is this that we may destroy an enemy though he be unarmed. . . . [I]n short everything is legitimate against an enemy."); CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRAETATUM 409-50 (James Brown Scott ed., Joseph H. Drake trans., Carnegie 1964) (1764) (stating that the "customs of certain nations" gave a "general license" to kill all enemy subjects, includng surrendering soldiers).

[175] *See* Burrus M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 MIL. L. REV. 83, 85 (1993) (indicating that summary execution of POWs was declining in frequency but common during the

iv. Pre-Modern Era: 1800 A.D.—1914 A.D.

As the nineteenth century progressed, POWs were increasingly viewed as unfortunates rather than criminals and, in 1863, the Lieber Code[176] marked the first major codification of a developing custom favoring the qualified right of surrendering soldiers to quarter. The Lieber Code generally prohibited Union troops to deny quarter[177] or kill captured POWs[178] on the ground that "[m]en who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."[179] However, military necessity continued to provide an important exception to the waxing force of custom: a provision recognized that, under circumstances of "great straits," a commander was permitted "to direct his troops to give no quarter . . . when his own salvation makes it impossible to cumber himself with prisoners."[180] Moreover, the Lieber Code explicitly denied quarter to enemy units "known or discovered to give no quarter,"[181] and enemy POWs who fit this description could be executed within three days of capture.[182] Furthermore, the Lieber Code was interpreted in concert with other applicable regulations, one of which ordered Union troops to refuse wholesale surrenders by Confederate troops eager to quit the war,[183] thereby further qualifying its scope and applicability. In practice, the Lieber Code, although it discouraged denial of quarter upon moral grounds, was of limited value in enforcing the rights of POWs against competing

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Enlightenment).

[176] *See supra* note 12.

[177] *See* Lieber Code, *supra* note 12, art. 60 ("It is against the usage of modern war to resolve . . . to give no quarter.").

[178] *See id.* art. 56 ("A [POW] is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.").

[179] *Id.* art. 15.

[180] *Id.* art. 60.

[181] *Id.* art. 62.

[182] *Id.* art. 66.

[183] *See* U.S. War Dep't, General Order No. 207 (July 3, 1863).

claims of military necessity, as both armies executed POWs out of expedience and in reprisal for violations real and imagined of the customs of war[184] and besieged garrisons were categorically denied quarter after their refusals to surrender.[185]

Still, the Lieber Code exerted a transnational influence upon the codification of a customary preference for granting quarter to defeated enemies that had been crystallizing within the martial case for centuries.[186] A series of states published military manuals incorporating much of the Lieber Code nearly verbatim.[187] The Brussels Conference of 1874[188] and the Hague Convention of 1907 codified, as a matter of international law, the custom reflected in the Lieber Code's general prohibitions against the denial of quarter, whether ad hoc or in an advance declaration.[189] Nevertheless, international practice, whether justified by claims of military necessity or simply by the relative weakness of any norm entitling defeated personnel to protection, belied diplomatic pronouncements and overwhelmed the general presumption in favor of quarter for surrendering forces. Examples abound: despite having promised quarter to secure the surrender of the besieged garrison at the Battle of Jaffa (1800), Napoleon, unable to feed his own troops, ordered 4000 Arab captives slain;[190] French forces fleeing their failed invasion of Russia (1812) were denied quarter by Russian cavalry; victorious Mexican forces at the Alamo (1836) refused quarter to permanently preclude seasoned veterans from rejoining the Texan struggle for independence;[191] and during the Russo-Turkish War (1877-78) Turks were denied quarter on the ground that, in the words of the Russian commanding general, "[t]here are circumstances under which it is impossible to make prisoners—when your force is small and prisoners might prove dangerous . . . . [S]ad necessity force[d] us to shoot them."[192] Both sides took extreme reprisals against POWs during the Boer War (1899-1900),[193] United States commanders ordered the slaughter of all males over ten years of age in fighting against Muslim guerrillas in the Philippines (1900-02)[194] and in the Russo-

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[184] *See* William E. Boyle, Jr., *Under the Black Flag: Execution and Retaliation in Mosby's Confederacy*, 144 MIL. L. REV. 148, 148-50, 154-55 (1994) (reporting a spiral of reprisals and counterreprisals taken against POWs during fighting between Confederate forces under the command of Lieutenant Colonel Mosby and Union forces under the command of Generals Sheridan, Custer, and Grant). For a comprehensive study and analysis of acts of reprisal against POWs of both armies during the Civil War, including execution of POWs, denials of quarter and maltreatment, see LONNIE R. SPEER, WAR OF VENGEANCE (2002).

[185] *See* SPAIGHT, *supra* note 17, at 99 (citing correspondence between garrison commanders and the commanders of besieging forces offering the besieged the privilege of parole upon an unconditional surrender while threatening to deny quarter in the event further military measures were necessary to overcome the fortifications).

[186] *See generally* HUMANITARIAN LAW OF ARMED CONFLICT, *supra* note 12.

[187] *See* HOLLAND, *supra* note 12, at 73-74 (listing states adopting military manuals incorporating the Lieber Code, including, inter alia, Britain, France, Spain, Italy, Portugal); WELLS, *supra* note 12, at 4 (noting near-direct translation of Lieber Code in military manuals of Germany, France and Russia published between 1880 and 1912). Commitments to these codifications in an era of suspicion and nationalist resentments remained suspect, however, and the traditional position—that the "humanitarianism as conceived by many modern civilized nations is a weakness rather than a virtue" and that the enemy could be more easily cowed by terror than by kindness—remained dominant. *See, e.g.*, GERMAN GENERAL STAFF, KRIEGSBRAUCH IM LANDKRIEGE ch. 1 (1902) (stating that adherence to customs protective of enemy POWs was incompatible with German "frightfulness," a concept whereby enemies experiencing German ferocity and mercilessness would be all the more likely to refuse to give battle in the future).

[188] *See* Congress of Brussels (1874) (providing, in 146 articles, for the humane treatment of POWs).

[189] *See* Hague Convention of 1907, *supra* note 96, art. 23(c) (prohibiting killing

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of an enemy *hors de combat*); *id.* art. 23(d) (prohibiting declaration that no quarter will be given). However, military necessity carved out exceptions from these codes of military regulations. *See, e.g.*, GERMAN GEN. STAFF, *supra* note 187, ch. 1 (explicitly recognizing that necessity could release troops from a general obligation to grant quarter).

[190] PICTET, *supra* note 12, at 24.

[191] FOOKS, *supra* note 143, at 113-22. For much of the conflict, neither Russian nor Japanese forces requested or gave quarter. SPAIGHT, *supra* note 17, at 94.

[192] SPAIGHT, *supra* note 17, at 93 (citing V.L. NEMIROVITCH-DANTCHENKO, PERSONAL REMINISCENCES OF GENERAL SKOBOLEV 165 (E.A.B. Hodgetts trans., 1884)).

[193] *See* 2 ELLERY C. STOWELL & HENRY F. MUNRO, INTERNATIONAL CASES 205 (1916) (reporting 1899 massacre of Boer prisoners at Elandslaagte and reprisal against British prisoners at Ladysmith during the Boer War in South Africa). For a general discussion of war crimes committed during the Boer War, see generally Drew L. Kershen, *Breaker Morant*, 22 OKLA. CITY U. L. REV. 107 (1997).

[194] *See Court-Martial of General Jacob H. Smith 1902*, *in* 1 THE LAW OF WAR 799, 800-01 (Leon Friedman ed., 1972) (discussing the order from Brigadier General Jacob H. Smith to Major L.W.T. Waller instructing his Marines to take no prisoners and that "[t]he more you kill and burn, the better you will please me"). For a discussion of the general suspension of IHL by United States forces in the

Japanese War (1904-05) Russia ceased granting quarter after receiving reports that wounded Japanese had feigned surrender only to shoot Russian troops, who believed the Japanese *hors de combat*, bypassing their positions.[195]

Contemporary commentators, while memorializing a general custom proscribing the denial of quarter, paid heed to state practice of unequivocally recognizing exceptions rooted in military necessity, including reprisal,[196] in circumstances where capturing forces were numerically inadequate to effectively subdue surrendering forces without unacceptably increasing the jeopardy of attack from other enemy forces not *hors de combat*,[197] and where a besieged force, obstinately resisting surrender beyond the point it might reasonably expect to prevail, obligated attacking forces to incur needless casualties storming the position[198] In short, although a cus-

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Philippines during the period, see PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 51-66 (2001).

[195] FOOKS, *supra* note 143, at 120-21.

[196] *See* DE MARTENS, *supra* note 165, bk. VII, ch. 4, at 272 (holding that quarter could be denied in retaliation for denial of quarter by the enemy); FOOKS, *supra* note 143, at 120-21 ("To make quarter [with respect to] the persons who have abused the confidence of the victor and shoot him in the back after being treated kindly, will compromise the success of the battle and perhaps, frustrate the plans of the entire campaign."); *id.* ("The commander must remember that the blood of one of his own men taken by . . . treachery should be more precious to his eyes than that of thousands of such villains committing acts against the laws of war.").

[197] BLUNTSCHLI, *supra* note 6, art. 580 (condoning the denial of quarter when capturing forces are too few to adequately secure surrendering soldiers without compromising either their mission or their safety); THOMAS ERSKINE HOLLAND, LAWS AND CUSTOMS OF WAR ON LAND 47, 58 (1904) (stating that "[a] white flag [indicating a desire to surrender] can protect only the force by which it is hoisted," and then only if every individual member of that force, as well as of other enemy forces that might still pose a danger, ceases to resist); SPAIGHT, *supra* note 17, at 266 (sanctioning the execution of prisoners who attempt to aid, by whatever means, their "uncaptured comrades" and thus endanger their captors). However, at least one commentator suggested that for capturing forces to execute POWs solely because they would otherwise hamper movement was an "inhumane" policy sure to provoke reprisal, even if it could be justified as militarily necessary. *Id.* at 266 (describing the execution of Peruvian POWs by Chilean captors desirous of moving without encumbrance in 1882 as a "wanton act" from which "bloody reprisals are bound to follow").

[198] Military history is "full of incidents in which a platoon or squad, having taken heavy casualties at the enemy's hands, finally prevails." OSIEL, *supra* note

tom disfavoring denial of quarter was crystallizing, scholars of

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23, at 120. The proposition that soldiers engaged in a life-or-death struggle should be required, immediately upon the indication of a desire to surrender on the part of their mortal enemies, to denature the emotions of rage and fear that impel them forward and to stifle any thoughts of reprisal and revenge for the deaths of their comrades struck nineteenth and early twentieth century commentators, many of whom were acquainted with combat, as incompatible with reality:

> During the heat of battle there is not much opportunity for . . . pity . . . . The soldier's training does not make him a machine to such extent that he is a passive weapon. The noise of battle, the sight of the dead and dying, the feeling of weariness after long hardships, may weaken his sense of fairness, and cause him to refuse to give quarter, and force his adversary to drink from the bitter cup of Death, even after he has asked for mercy by surrendering.

FOOKS, *supra* note 143, at 113-14. Similarly,

> [I]t is often impracticable to grant quarter to troops who resist to the last moment. No war right of killing is recognised [sic] in such circumstances; it is simply the necessity of war which justifies the refusal of quarter. It must often happen that in the storming of a trench, when men's blood is aboil and all is turmoil and confusion, many are cut down or bayoneted who wish to surrender . . . .

SPAIGHT, *supra* note 17, at 91.

In practice, "Too late, chum," has often been the response received by eleventh-hour would-be surrenderees. KEEGAN, *supra* note 5, at 50-51. Psychologists have explained that the frenzy of fear, bloodlust and primordial passion unshackled by the horrors of combat accounts for the denial of quarter and other abuses of POWs in such circumstances and that the grim practice of soldiers is or should be excusable under the defense of temporary insanity. *See, e.g.*, DAVE GROSSMAN, ON KILLING 179 (1995); JONATHAN SHAY, ACHILLES IN VIETNAM 77-102 (1994) (explaining the extreme reactions of soldiers to the experience of combat). While not technically an exception based on military necessity, the denial of quarter predicated upon the human emotions that render the actual grant improbable is essential to an explanation for the variation between nineteenth century practice on the one hand and a restatement of an emerging custom relative to quarter on the other. *See* BEST, *supra* note 20, at 349 n.109 (restating general consensus of commentators that the exception to the right to quarter in the case of "a fortress refusing surrender even when its walls had been breached, so that the besiegers had to go through the often hideous business of an assault," survived well into the twentieth century); CARLOS CALVO, LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE § 2138 (A. Rausseau trans., 1st ed. 1873) (suggesting that a garrison may be massacred for futile resistance); HALL, *supra* note 156, at 474 ("I believe it has always been understood that the defenders of a fortress stormed have no right to quarter." (citing the Duke of Wellington in correspondence, circa 1820)); HOLLAND, *supra* note 197, at 58 (noting that, although the precise definitions are left to practice, after a "stubborn and prolonged siege" an attacking force is relieved of a customary obligation to grant quarter and that one who would demand quarter must not delay his surrender until the very last possible moment lest he disentitle himself).

the era described a stable, consistent practice grounded in necessity to deny quarter.

v. The Great Wars: 1914 A.D.—1945 A.D.

During World War I, several belligerents entered into bilateral agreements governing the status of POWs, although few were ratified[199] and most parties, including the United States, accepted few if any legal obligations.[200] Although some belligerents recognized expanded customary duties, including the general obligation to grant quarter,[201] in either official policy statements or military manuals,[202] most domestic military legal systems retained explicit exceptions allowing the denial of quarter under categories of circumstances, including military necessity and reprisal,[203] while others expressly ordered their military forces to deny quarter in order to sow terror amongst their enemies.[204] Moreover, as the very concept of surrender remained as shameful to the martial mind as it was to the ancients,[205] it was not difficult for several belligerents to indoctrinate their armies to neither grant nor request quarter, even if they did not issue direct orders,[206] nor was it unusual that units would make this deci-

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[199] BARKER, *supra* note 164, at 16.

[200] *See* Telegram from Lansing to Stovall, American Minister to Switzerland, U.S. State Department, Foreign Relations, supp. 2 (1918) (stating that the United States "does not consider [the] Geneva Convention [of 1906] binding in [the] present war . . . because all belligerents [are] not signatory to [the] convention. Similar interpretation has been consistently given to [the] Hague convention.").

[201] *See* U.S. WAR DEP'T, FIELD MANUAL 27-10, RULES OF LAND WARFARE ¶ 182 (1914) [hereinafter RULES OF LAND WARFARE (1914)] (stating that "[i]t is especially forbidden . . . to declare that no quarter will be given"); *id.* ¶ 183.

> It is no longer contemplated that quarter will be refused to the garrison of a fortress carried by assault, to the defenders of an undefended place who did not surrender when threatened with bombardment, or to a weak garrison which obstinately and uselessly persevered in defending a fortified place against overwhelming odds.

Id.

[202] *See, e.g.*, JOHN J. PERSHING, FINAL REPORT OF GENERAL JOHN J. PERSHING 85 (1919) (instructing the Provost Marshal General, by order of General Pershing, supreme United States commander in World War I, "to follow the principles of the Hague and Geneva Conventions in the treatment of prisoners, although these [a]re not recognized as binding in the present war"). Official United States military regulations, which superseded while incorporating much of the Lieber Code almost verbatim, denied the force of most, if not all, legal obligations. *See* RULES OF LAND WARFARE (1914), *supra* note 201, ¶¶ 9, 34 (recognizing that belligerents were permitted to "appl[y] any amount and any kind of force which is necessary for the purpose of the war" while imposing only the very minimal obligation that soldiers refrain from "all such kinds and degrees of violence as are not necessary"). However, the *Rules of Land Warfare* (1914) did impose duties and grant privileges arising from customary principles of necessity, humanity and chivalry. *See id.* ¶¶ 8, 9.

[203] *See* RULES OF LAND WARFARE (1914), *supra* note 201, ¶ 368 (stating that

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failure to make a clear and good faith intent to surrender by either the hoisting of a white flag or the disposal of weapons and the clear showing of hands disentitled the enemy to quarter); *see also id.* ("All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.").

[204] *See* BARKER, *supra* note 164, at 28 n.*.

> As soon as you come to blows with the enemy he will be beaten. No mercy will be shown! No prisoners will be taken! As the Huns under King Attila made a name for themselves, which is still mighty in traditions and legends today, may the name of Germans be so fixed in China by your deeds that no Chinese should ever again dare to look at a German askance . . . open the way for *Kultur* once and for all.

Id. (quoting Kaiser Wilhelm, reviewing troops in Bremerhaven in July 1914); *see also* Theodore S. Woolsey, *Retaliation and Punishment*, 1915 AM. SOC'Y INT'L L. PROC. 62, 63 (stating that the German General Staff considered IHL superseded by military necessity and that the exercise of humanitarianism with respect to enemy POWs was a lapse "into sentimentality and flabby emotion" to be avoided).

[205] *See* BARKER, *supra* note 164, at 29 (describing the aversion to surrender felt by honorable soldiers as the "age-old idea that it is better to die fighting than to be captured"). So deeply inculcated was this imperative of martial culture that soldiers would fight to the death against vastly superior forces to avoid the moral stigma of capture. *See* FOOKS, *supra* note 143, at 99 (relating the officially-heralded saga of the five-day ordeal of a United States battalion commander who, despite being surrounded by a vastly superior German force and without rations or medical supplies for his attrited force, refused to surrender). Moreover, so powerful was the obligation to demonstrate bravery in the face of the enemy that soldiers who merely retreated under overwhelming fire knew and accepted that they could be executed. *See id.* at 102-04 (noting that a French lieutenant, executed for withdrawing his company rather than permit it to be overrun by the Germans, conceded that he had been wrong). The soldierly aversion to surrender continues to the present day and is reflected in regulations enjoining United States military personnel from voluntary surrender and from accepting parole. *See* Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955), *amended by* Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (Mar. 28, 1988) (prohibiting military personnel from voluntary surrender, accepting parole and other acts of disloyalty). For a discussion of the Code of Conduct and of the shame that continues to attach to the act of surrender, see David H. Hackworth, *Neglect of Code Insults Real Heroes*, SUN-SENTINEL (Fort Lauderdale, Fla.), Jan. 19, 1995, at A23.

[206] The United States issued orders to troops in forward areas to "hold their

sion independent of their command structure.[207] Throughout World War I, quarter was systematically denied as a standing tactical procedure, in reprisal for perfidious surrenders and for posing as casualties only to resume combat[208] out of vengeance[209] and out of alleged necessities, including avoidance of encumbrances.[210]

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positions at any cost," instructions that implied that they were to succeed or die in the attempt, rather than offer surrender if they failed. FOOKS, *supra* note 143, at 96. The French high command reinforced these orders, instructing United States forces joining the battle in 1917 that as they could anticipate German perfidious surrenders they should themselves neither grant nor request quarter. *Id.*

[207] *See* BARKER, *supra* note 164, at 117 (reporting that United States units, including the enlisted personnel of the 28th Infantry Division, signed pledges not to grant or accept quarter). The reasons are not difficult to fathom: during World War I, many soldiers, as have soldiers since antiquity, considered the act of surrender to be inherently dishonorable. FLORY, *supra* note 154, at 67.

[208] Perfidious surrenders, whereby soldiers feign submission to delude and lure the enemy into close proximity only to reclaim their weapons and resume fighting at great advantage over adversaries who have relaxed their guard, was a common practice during World War I. *See* BARKER, *supra* note 164, at 35 (citing widespread German use of perfidious surrender during the Battle of the Somme (1916)); FOOKS, *supra* note 143, at 121 ("The practice [of perfidious surrender] was repeated many times during the World War, and especially in the Battle of the Somme," to great effect). In response, defrauded adversaries would execute POWs taken subsequently, including those who had committed perfidy as well as others whose only offense was to have been members of the same army. *See* BARKER, *supra* note 164, at 35 (stating that, subsequent to German perfidious surrender at the Somme, "[n]o prisoners were taken that day, and it was a long time before German cries of 'Kamerad' were accepted with any confidence by the British troops involved in the action"); FOOKS, *supra* note 143, at 117 (relating the explanation offered by the commander of the United States 28th Infantry Division for the relatively small number of German POWs captured by his troops at the Battle of Cantigny (1918): when a German officer had held up his hands to surrender, another German shot an American officer, and "[a]fter this the captors saw 'red' and killed about 380 of the German captives"). To the present, soldiers express outrage at the perfidious killing of their comrades, and perfidy remains perhaps the most egregious breach of the martial code. *See* BEST, *supra* note 20, at 292 (describing perfidy as "to borrow a valuable Christian idea, IHL's 'sin against the Holy Spirit'").

[209] *See* GUY CHAPMAN, A PASSIONATE PRODIGALITY 99-100 (1933) (recounting an oft-repeated incident wherein, after a prolonged and bloody advance across a series of trenches, a vengeful British sergeant "half mad with excitement" took the fieldglasses from a surrendering German officer only to "tuc[k] the butt of his rifle under his arm and sho[o]t the officer straight through the head").

[210] Toward the end of World War I the great mass of surrendering Germans so overwhelmed the capacity of United States troops to secure and provide for them

On balance, the reflections of commentators assessing the lessons of the "Great War" reinforced the conclusion that the fabric of a martial custom favoring the grant of quarter continued to be woven through with exceptions. Where rapidity and secrecy were paramount, such as in the case of a small force occupying a strategic position in advance of a main body for whom disclosure of their purpose or encumbrance by POWs would enhance the likelihood of their own destruction[211] and compromise the mission of the larger force,[212] or where the exigencies of combat precluded the immediate extension of protection to all those manifesting an intent to surrender,[213] jurists conceded the legitimacy of military necessity. Although a minority contended that the grant of quarter to persons rendered *hors de combat* had reached the status of an absolute obligation from which soldiers were not permitted to dero-

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that decisions were made to kill all German forces either by refusing quarter or subsequent to capture. *See* FOOKS, *supra* note 143, at 120 (reporting communication received from the commanding colonel to the effect that "[i]n the advance upon Sedan, just prior to the armistice, November 11, 1918, the 16th United States Infantry found it difficult to take all prisoners of war who ordinarily are entitled to such treatment because of the great mass of the enemy encountered and overcome").

[211] *See* HALL, *supra* note 156, at 474 (allowing that, although the presumption runs strongly in favor of quarter, an exception may be made when "it is impossible for a force to be encumbered with prisoners without danger to itself" from other enemy forces, such as where "small bodies of troops remain[] for a long time isolated in the midst of enemies").

[212] *See* FOOKS, *supra* note 143, at 121-22.

> Troops sent on reconnoitering duties far in advance of the remainder of their forces, or who occupy an important strategic point, a bridge, exploration of a forest, ravine, or a fortification which is the key to a position for the purposes of holding until the main body of their forces arrive, must not be too considerate for any small group of the enemy which frustrates such mission.

Id.

[213] Writing in response to his own experiences during World War II, Fussell expresses the intellectual and moral disruption occasioned by the stochastic combat environment by noting that the "relative few who actually fought know that the war was not a matter of rational calculation. They know madness when they see it. PAUL FUSSELL, WARTIME 283 (1989). Under such conditions, the exercise of dispassionate ethical and moral judgment and unfaltering compliance with formal legal rules expected by lawyers and others ignorant of the combat environment is more than perhaps ought to be expected.

gate,[214] most continued to view the grant of quarter through the prism of state practice, from which it appeared as a custom-based privilege with respect to which the recipient could assert an entitlement only in the absence of any military necessity that would move the grantor to deny it. In the interwar period, humanitarians tried to harden this conditional custom into something more protective of soldiers *hors de combat*, but the resulting Geneva Conventions of 1929, in some senses simply an expansion upon the membership of their conventional predecessors, added little more than an additional declaration that POWs were immune from reprisal and entitled to protection from the moment of capture.[215]

Attempts to stamp a legal imprimatur upon the customary regime governing quarter were not confined to the international arena, as several states made minor modifications to their respective military manuals in recognition of the interplay between developments in IHL[216] and the trajectory of state practice.[217] Nonetheless, states continued to veer from the increasingly restrictive positive law crafted by diplomats and glossed by legal scholars, hewing instead to the restatements of custom proffered by their military establishments: updated military manuals retained the primacy of the actual practice and usage of soldiers atop the hierarchy of sources of obligation incumbent upon their armed forces,[218]

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[214] *See* 3 ALBERIC ROLIN, LE DROIT MODERNE DE LA GUERRE 287-88 (1921) (holding that neither supreme necessity and imminent danger permit denial of quarter or the killing of POWs subsequent to capture, as the obligation to accept surrender and treat POWs with humanity is absolute); *cf.* HALL, *supra* note 156, at 474 (limiting the scope of a military necessity exception to the obligation to grant quarter to the vanishing point by holding that "[p]risoners who cannot safely be kept can be liberated, and the evil of increasing the strength of the enemy is less than that of violating the dictates of humanity, unless there is reason to expect that the prisoners if liberated, or a force successfully attempting rescue, would massacre or ill-treat the captors").

[215] *See* Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 2, 47 U.S.T. 2021 [hereinafter Geneva Convention of July 27, 1929] (extending protective rules and principles of Hague Regulations of 1899 and 1907 and establishing comprehensive rules for protecting POWs).

[216] *See* U.S. WAR DEP'T, FIELD MANUAL 27-10, RULES OF LAND WARFARE ¶ 2 (1934) [hereinafter RULES OF LAND WARFARE (1934)], reissued in substantially identical form as U.S. WAR DEP'T, FIELD MANUAL 27-10, RULES OF LAND WARFARE (1940) [hereinafter RULES OF LAND WARFARE (1940)] (updating the *Rules of Land Warfare* (1914), and making explicit reference to parts of the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1929 as having legal effect as between parties under the rubric of the "written rules or laws of war"); *see also* U.S. WAR DEP'T, CASES ON MILITARY GOVERNMENT (1943) (supplementing the *Rules of Land Warfare* (1940), and elaborating cases concerning the rules of armed conflict that created legal obligations for the United States and members of its armed forces); U.S. WAR DEP'T, TREATIES GOVERNING LAND WARFARE (1944) (explaining the legal significance of obligations undertaken by the United States between 1929 and 1937 under treaties interpreting the Hague and Geneva Con-

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ventions of 1907 and 1929 respectively). For a discussion of the specifics of these instruments and manuals, see generally WELLS, *supra* note 12.

[217] Law reflects and shapes practice, just as practice reflects and shapes law, and the disposition of POWs during war is determined by the complex relationship between positive law, custom, and the practical exigencies of combat. *See* FLORY, supra note 154, at 10 ("The treatment of prisoners is strongly influenced by the relation between international law and necessity . . . .").

[218] Neither the 1934 nor the 1940 revisions to the *Rules of Land Warfare* withdrew support for the foundational basis of the martial code, namely the promotion of chivalric virtue to the extent possible in light of the practical reality of military necessity. *See* RULES OF LAND WARFARE (1934), *supra* note 216, ¶¶ 3, 4 (restating as its central principle the defense of the chivalric code with deference to military necessity). As such, although the United States did not craft its military manuals in order to grant *carte blanche* to its armed forces, nonetheless United States military regulations did not incorporate obligations to POWs derived from IHL treaties in a manner inconsistent with the promotion of chivalry or the military mission of its armed forces. *See id.* ¶ 22 (stating that "[t]he object of war is to bring about the complete submission of the enemy as soon as possible by means of regulated violence"); RULES OF LAND WARFARE (1940), *supra* note 216, ¶ 22 (same). Specifically, although both the 1934 and 1940 revisions drew upon language in the 1914 *Rules of Land Warfare*, recognizing that surrendering enemies are generally entitled to quarter, neither revision repealed the explicit exception which provided that under certain circumstances military necessity might permit the denial of quarter to surrendering enemies. *See* RULES OF LAND WARFARE (1934), *supra* note 216, ¶ 33 (restating paragraph 182 of the *Rules of Land Warfare* (1914), to the effect that surrendering enemy personnel are generally entitled to quarter). *But see id.* ¶ 85 (providing that a commander could deny quarter on the grounds that it was necessary to do so in the interest of self-preservation or that caring for enemy POWs interfered with his mission); RULES OF LAND WARFARE (1914), *supra* note 201, ¶ 368 (detailing exceptions to the general entitlement to quarter). To an important extent, the retention of exceptions based on necessity to the general obligation to grant quarter comports with the internal value system of soldiers of the era for whom, as in earlier periods, the concept of surrender was suspect on its face as an ostensibly dishonorable act that would disentitle the soldier offering his surrender to honorable treatment, whether from his own comrades or from the enemy. *See* BARKER, *supra* note 164, at 202-03 (suggesting that troops were expected, as a matter of martial honor, to govern themselves in accord with obligations to refuse surrender, parole, voluntary disclosure of information to the enemy and inducements to disloyalty). In short, the

and the martial cultures of a number of militaries retained a disdain for the very concept of surrender.[219] Thus, as World War II erupted, the denial of quarter was condoned, whether explicitly or tacitly, by several leading states,[220] resulting in a round-robin of reprisals.[221] Following their invasion of the Philippines, Japanese troops drove, at bayonet point, over 40,000 Allied captives to their deaths on the Bataan Death March (1942),[222] a number exceeded by the Red Army after

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absence of an absolute prohibition against denial of quarter in military manuals may reflect this unfavorable assessment of the honor and entitlements of a surrendering soldier.

[219] Since antiquity, soldiers have been inculcated in a martial culture that ascribes dishonor to the act of surrender and insists that good warriors simply do not permit themselves to be taken prisoner. *See supra* note 205. Although by the outbreak of World War II civilian diplomats and lawmakers had drawn this martial value into some discord with their humanitarian objectives, surrender remained anathema to the martial mind as well to the cultural imperatives of several of the belligerent parties, which adjudged the surrendering soldier to be traitorous. *See* ERNST H. FEILCHENFELD, INSTITUTE OF WORLD POLITY, PRISONERS OF WAR 17 (1948) (indicating neither the Soviet nor Japanese governments recognized any interests with respect to their POWs on the ground that surrender was antithetical to their culture); GERALD F. LINDERMAN, THE WORLD WITHIN WAR 50-51 (1997) (reporting that Japanese soldiers who surrendered were officially written out of the history of Japan); RICHARD J. OVERY, RUSSIA'S WAR 107 (1997) (noting that Stalin issued Order 270 in August 1941, declaring that Soviet soldiers who surrendered were "traitors" subject to death upon repatriation and that the wives of Soviet POWs would be imprisoned); SDACPOW, *supra* note 144, at 20 (referencing the U.S. Code of Conduct, promulgated in 1953, which codified a set of customary obligations incumbent upon United States soldiers, including the following: "Article II. I will never surrender of my own free will.").

[220] *See, e.g.*, FUSSELL, *supra* note 213, at 284 ("Never give the enemy a chance; the days when we could practice the rules of sportsmanship are over. . . . Every soldier must be a potential gangster. . . . Remember you are out to kill." (citing BRITISH HANDBOOK OF IRREGULAR WARFARE (1942)).

[221] *See* OMAR BARTOV, THE EASTERN FRONT 1941-1945: GERMAN TROOPS AND THE BARBARISATION OF WARFARE 118 (2d ed. 1985) (describing cycle of reprisals and counter-reprisals triggered by German denials of quarter to Soviet POWs); RICHARD HOLMES, ACTS OF WAR 381-83 (1985) (recounting similar cycles of reprisal on the Western Front).

[222] Although Japanese forces did not summarily execute all their POWs, the standing Japanese practice was to forcibly march them to death and to shoot or bayonet stragglers; the practical result was identical to the summary refusal to grant quarter. *See, e.g.*, Trial of Lieutenant-General Baba Masao, 11 UN WAR CRIMES COMM'N, *supra* note 43, at 56 (chronicling forcible evacuation of Allied POWs in Borneo that resulted in the death, by exhaustion and shooting, of nearly all the captives). For a detailed discussion of Japanese transgressions against law

the Nazi defeat at Stalingrad (1943) after which more than 105,000 German POWs were dispatched both outright and on the march to *gulags*.[223] German forces repeatedly denied quarter to Allied troops,[224] most notoriously at Malmedy during the Battle of the Bulge (1944),[225] and Allied soldiers re-

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and/or martial custom during World War II, including the denial of quarter, see generally LORD RUSSELL OF LIVERPOOL, THE KNIGHTS OF BUSHIDO (1958). *See also* James R. Dawes, *Language, Violence, and Human Rights Law*, 11 YALE J.L. & HUMAN. 215, 234-35 (1999) (detailing Japanese abuses of British POWs in Southeast Asia).

[223] BARKER, *supra* note 164, at 35 & n.*.

[224] *See* The Nuremberg Trial, 6 F.R.D. 69 (1946) (citing regulation issued by the German High Command to members of the German Armed Forces calling for "ruthless and energetic action . . . by force of arms (bayonets, butts and firearms)" against Soviet POWs and threatening any German soldier "who does not use his weapons, or does so with insufficient energy" against Soviet POWs with punishment); AMBROSE, *supra* note 137, at 112 (noting that German troops cut the throats of paratroopers caught suspended from their harnesses, and thus effectively *hors de combat*, during the Normandy invasion); BARKER, *supra* note 164, at 57 (discussing denials of quarter between British and German troops in North Africa in 1942-43); LINDERMAN, *supra* note 219, at 107-14 (noting that German soldiers would frequently kill United States POWs captured in possession of German material on the presumption that the United States POW had taken the items from a German soldier he had himself killed); LORD RUSSELL OF LIVERPOOL, THE SCOURGE OF THE SWASTIKA 23-24 (1954) (discussing German refusals to grant quarter to, and subsequent executions of, captured British at Dunkirk in 1940); *id.* at 26-27 (reprinting United States reports of a German massacre of captured United States troops at St. Vith during the Battle of the Bulge in 1944); *id.* at 41 (relating German executions of United States airmen captured unharmed but later shot on the false claim that they were "attempting to escape"); *The Abbaye Ardenne Case*, *in* 4 UN WAR CRIMES COMM'N, *supra* note 43, at 97 (condemning the commander of a Nazi SS Regiment for having counseled his men to deny quarter to Allied troops); *The Dostler Case*, *in* UN WAR CRIMES COMM'N, *supra* note 43, at 22 (convicting commander of the German 75th Army Corps, General Anton Dostler, for ordering, on March 25, 1944, the summary execution of fifteen uniformed United States POWs captured while on a mission to demolish a railway tunnel betwen La Spezia and Genoa); *The Peleus Trial*, in 1 UN WAR CRIMES COMM'N, *supra* note 43, at 1, 12 (convicting German submarine commander for machine gunning survivors of a sunken ship); *Trial of Gunther Thiele and Georg Steinert*, *in* 3 UN WAR CRIMES COMM'N, *supra* note 43, at 56-57 (convicting two members of a German unit for the denial of quarter to a wounded United States officer).

[225] *See generally* JAMES J. WEINGARTNER, CROSSROADS OF DEATH: THE STORY OF THE MALMEDY MASSACRE AND TRIAL (1979) (disucssing the trial in Dachou, Germany, May 12-July 16, 1946, where seventy-two soldiers of I Panzer Corps were convicted for denying quarter to U.S. troops surrendering during the Battle of the Bulge in Malmedy, Belgium in December, 1944).

ciprocated against Axis troops,[226] including a mass execution of SS camp guards during the liberation of Dachau (1945)[227] and the ruthless extermination of Japanese troops in the Pacific Theater by United States Marines in 1944-45.[228]

Moreover, the belligerents seized upon the advent of large-scale guerrilla warfare and commando operations[229] to further clarify, and even codify, the preexisting martial custom conferring upon military authorities wide latitude to self-define and apply exceptions to the general entitlement to quarter. Although the legal status of missions undertaken to disable or destroy industrial and other strategic installations beyond the traditional theater of operations was the subject of dispute during World War II,[230] for the Nazi general staff, operations against infrastructure were ipso facto illegal methods of warfare on the asserted grounds that members of units engaged in such missions did not themselves grant quarter or otherwise comply with IHL, and thus warranted reprisal in the form of the eradication of all members of the enemy units concerned.[231] With the infamous *Kommando Befehl* (Commando Order) in October 1942,[232] Germany ordered its armed forces to deny quarter to all Allied forces on "so-called Commando missions in Europe or Africa,"[233] and this instruction remained in effect for the duration of the war.[234] Allied soldiers branded as "commandos" were executed with the official explanation that they were killed "*in Kamf oder af der Flucht*" (in battle or attempting to escape)."[235] A similar but informal regime governed the conflict in Yugoslavia where, with few exceptions, no belligerent granted quarter.[236]

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[226] *See* Richard A. Falk, *The Circle of Responsibility*, *in* CRIMES OF WAR 224 (Richard A. Falk et al. eds., 1971) (contending that United States troops denied quarter to Axis soldiers, albeit with significantly less frequency than their adversaries); *see also* AMBROSE, *supra* note 137, at 206 (chronicling a reported incident wherein a heavily decorated and widely respected United States officer is rumored to have impulsively machinegunned German POWs on a work detail); STEPHEN E. AMBROSE, CITIZEN SOLDIERS 43-44 (1997) (reporting that the commander of the 101st Airborne Division, General Maxwell Taylor, ordered his troops to deny quarter to German soldiers during Operation Overlord). After World War II, a German newspaper published the names of 369 German soldiers alleged to have been denied quarter by United States troops, but a German court, under United States military administration, refused to assert jurisdiction. *See* Malmedy Massacre Trial, *at* http://www.scrapbookpages.com/DachauScrapbook/DachauTrials/MalmedyMassacre03.html.

[227] *See* Thomas Farragher, *Vengeance at Dachau in Dark Footnote to Death Camp's Liberation*, BOSTON GLOBE, July 2, 2001, at A1 (reporting that in United States soldiers of the 45th Infantry Division, after liberating Dachau, executed least seventeen SS guards at least in part in reprisal for the Malmedy massacre).

[228] *See* JOHN W. DOWER, WAR WITHOUT MERCY 52-53, 61-71 (1986) (reporting general denial of quarter to Japanese forces by United States Marines motivated by vengeance for Pearl Harbor and Bataan Death March); LINDERMANN, *supra* note 219, at 143-84 (chronicling the Pacific War).

[229] "Commando operations" is a broad term that includes missions undertaken outside the actual theater of war to demolish military installations, sabotage industrial plants, sink warships in harbor, provide intelligence to partisan groups, rescue prisoners and otherwise disrupt and damage enemy capacity to conduct traditional military operations.

[230] *See generally* Baxter, *supra* note 12 (discussing legal status of commando operations during World War II).

The academic literature written in the aftermath of World

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[231] *See* KALSHOVEN, *supra* note 28, at 190-92 (summarizing the argument offered by the Legal Department of Oberkommando der Wehrmacht that commandos were not entitled to the protections of the customs of war as 1) they did not themselves grant quarter to civilians or soldiers, 2) they wore German uniforms when engaging German forces and 3) even when they did wear proper uniforms and observe the laws and customs of war they were not honorable soldiers inasmuch as honorable soldiers did battle against other soldiers and did not join "terror and sabotage groups"). In fact, many of those recruited to these extremely dangerous units had indeed been drawn from the ranks of convicted military personnel, who presumably had less to lose than other soldiers, and some "generally behaved in a perfidious manner totally unbefitting the honourable profession of arms" by denying quarter and by the perfidious wearing of German uniforms. BARKER, *supra* note 164, at 22. Nonetheless, not all members of the German High Command concurred with this legal judgment: Admiral Canaris believed that the Kommando Befehlung was applicable only to commandos captured in civilian clothing or German uniforms and not to properly uniformed soldiers, regardless of their missions. KALSHOVEN, *supra* note 28, at 190-92.

[232] Fuehrer Order Concerning Handling of Commandos, 18 October 1942, International Military Tribunal Document 498-PS, *reprinted in* 3 U.S. G.P.O., NAZI CONSPIRACY AND AGGRESSION 416-17 (1946)

[233] "From now on all enemies on so-called Commando missions in Europe or Africa challenged by German troops, even if they are to all appearances soldiers in uniform or demolition troops, whether armed or unarmed, in battle or in flight, are to be slaughtered to the last man." *Id.*

[234] *See* Treatment of Commando Participants, 25 June 1944, International Military Tribunal Document 551-PS, *reprinted in* 3 U.S. G.P.O., *supra* note 232, at 316-400.

[235] KALSHOVEN, *supra* note 28, at 190.

[236] KEEGAN, *supra* note 5, at 54.

War II reveals that, despite the progressive development of IHL and its normative influence upon eminent international lawyers, the martial code had yet to be displaced as the lodestar guiding state practice. Although statements of absolutism with respect to the quarter were working their way into some commentaries,[237] scholars continued to recognize the legal legitimacy of exceptions carved out of the general rule in the interest of self-preservation.[238] In sum, although the customary regime governing warfare had evolved since ancient times to enhance the protections owed to soldiers rendered *hors de combat*, state practice butted up against this evolving regime and, at the time of the Normandy invasion in June 1944, martial honor, reflected in the contents of military manuals and above all in the intersubjective understandings and practice of the professional soldierly caste, did not categorically proscribe denial of quarter to enemy soldiers offering their surrenders, nor did it absolutely preclude execution of POWs under circumstances of military necessity.

b. Violation of Parole

Although in ancient times most members of a defeated force could expect a swift death,[239] POWs were on occasion granted a limited parole[240] and released, permitting them to serve as intermediaries in diplomatic negotiations and as couriers of the news of a defeat to a conquered people.[241] Honor was enough to ensure the effectiveness of the grant of parole: anecdotal evidence indicates that POWs granted their release returned after their service as emissaries, even armed with the knowledge that return meant sure death.[242] By the Middle Ages, more POWs were released upon their promise to refrain from further acts of belligerency[243] and special feudal courts punished breaches of the *jus armorum*, including breaches of parole agreements, committed by dishonorable knights.[244] During the Enlightenment, the concept of the soldier as a servant of his government not responsible for its policies began to take root[245] and as it did, the system of parole was augmented by a regime whereby, although poor prisoners could often expect the sword, wealthy captives could hope to secure parole upon the payment of a ransom.[246] By the late seventeenth century, parole was no longer accompanied by a financial transaction and, during the American Revolution, captured officers of both forces[247] were routinely released upon their promises simply to refrain from further belligerency.[248] Although by the late eighteenth century the violation of parole was no longer universally treated as a capital crime,[249] it remained an ignominious offense.[250]

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[237] *See, e.g.*, 2 HENRY WHEATON, INTERNATIONAL LAW 179-80 (Arthur Berriedale Keith ed., 7th ed. 1944) (stating that by the end of World War II the privilege of quarter was crystallizing into a near-absolute right).

[238] *See* FLORY, *supra* note 154, at 159-60 (affirming that in "very unusual circumstances" capturing personnel may deny quarter).

[239] *See supra* note 143.

[240] "Parole" is a legal term used with respect to POWs to refer to an agreement between the surrendering soldier and his captors (or, in the modern era, with the detaining state) whereby the captors release the prisoner in consideration for his promise to refrain from rejoining the conflict, contributing to the war effort or, in some cases, leaving a certain geographic area. *See* Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 200 (1998) (defining parole under international law (citing U.S. DEP'T OF DEFENSE, DIRECTIVE 1300.7, TRIANING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT encl. 2, para. B(3)(a)(5) (Dec. 23, 1988))). Although parole is granted and accepted under great duress, it is an agreement with moral, and legal, consequences. WALZER, *supra* note 12, at 47.

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[241] *See* Brown, *supra* note 240, at 202 (noting the Carthaginian practice of granting parole to POWs for these purposes).

[242] *See* 2 PIERINO BELLI, DE RE MILITARI ET BELLO TRACTUS 126 (James Brown Scott ed., Herbert C. Nutting trans., Clarendon Press 1936) (1563) (chronicling the return of Regulus to Carthage after his parole to Rome where he urged the Senate to abandon Roman POWs (including himself), to death).

[243] *See* 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 1150 (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688) (asserting that the grant of parole obligated an individual to refrain from belligerency against the grantee and his sovereign).

[244] The primary constitutive force behind the medieval regime of parole was the honor of the soldier to whom it was granted. *See* BALTHAZAR AYALA, DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARY LIBRI 58 (John Westlake ed., John Pawley Bate trans., Carnegie 1912) (1582) (describing violation of parole as a breach of a sacred trust). Strong though it was, honor was not always adequate to bind knights to their promises; death or other punishment was visited upon the parole violator. M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 27-34 (1965); *see also* MERON, HENRY'S WARS, *supra* note 12, at 168 (discussing case of an English knight who escaped his French captors before receiving parole and was ordered back to custody); Green, *supra* note 99, at 291 (describing conviction of a French knight in chivalric court for violating parole).

[245] *See generally* VATTEL, *supra* note 165 (asserting that because quarrels were between states and not men, individual soldiers were entitled to their release under the natural law principle of respect for human dignity).

[246] *See* Sean McGlynn, *The Myths of Medieval Warfare*, HIST. TODAY, Jan. 1994, at 28. The payment of ransom to further secure the promise of the parolee largely ceased with the Treaty of Westhpalia in 1648, and ransom was replaced by reciprocity: each contesting government had interests in the return of its prisoners, and the release of POWs came to be governed on this basis. *Id.*; *see also* 3

The Lieber Code described parole as a "pledge of individual good faith and honor to do, or to omit doing, certain acts after he . . . shall have been dismissed . . . from the power of the captor"[251] and explicitly prescribed death for violation of the conditions attached to the grant.[252] The solemnity of the

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GROTIUS, LIBRI TRES, *supra* note 155, ch. 14, § 9 (describing reciprocal paroles of POWs as advantageous, or at least not disadvantageous, to both sovereigns on the ground that prisoners, while in the custody of the detaining power, were as if already dead to the cause of their governments).

[247] Parole was not exclusive to officers: enlisted personnel were occasionally granted the option in lieu of confinement. Carnahan, *supra* note 175, at 115 (describing parole of enlisted personnel of the Virginia Militia by British General Benedict Arnold).

[248] Although the promise to abstain from further acts against the enemy was standard consideration for a grant of parole, during the American Revolution, capturing forces imposed additional conditions, including obligations to refrain from criticism of the opposing side and to respond to a summons if requested. *See* CHARLES H. METZGER, THE PRISONER IN THE AMERICAN REVOLUTION 193 (1971).

[249] The traditional punishment for a parole violator was death, particularly if the violator was subsequently recaptured under arms. FLORY, *supra* note 154, at 124; *see also* SPAIGHT, *supra* note 17, at 296-97 (noting the hanging of a United States officer, Colonel Hayne, by the British in 1782 for violating parole); *id.* at 298 (indicating that aggravating circumstances justifying death include being in possession of arms and attempted assassination). However, some commentators restricted the ultimate sanction to mercenaries. *See, e.g.,* GENTILI, *supra* note 152, at 18. Additionally, belligerents entered into agreements to specify lesser punishments for the offense. *See, e.g,* Treaty of Amity and Commerce, *supra* note 170 (providing, inter alia, that violation of parole would result in imprisonment at close confinement rather than death).

[250] *See* SPAIGHT, *supra* note 17, at 297 (indicating that a parole violator was "shunned by gentlemen").

[251] *See* Lieber Code, *supra* note 12, art. 123. The standard promise given in exchange for parole was to not conduct belligerent acts during the present conflict unless exchanged for a POW of the other belligerent. *Id.* art. 130.

[252] *See id.* art. 124 ("Breaking the parole is punished with death when the person breaking the parole is captured again."); *id.* art. 130 ("[C]ases of breaking parole . . . can be visited with the punishment of death . . . .").

grant dictated that it be offered only where the honorableness of the grantee could be accurately determined and where the agreement could be recorded. Consequently, the Lieber Code restricted the grant of parole to officers[253] in non-combat situations,[254] and it required an exchange of written documents.[255] Moreover, as parole was conditioned upon a promise secured by honor, it could be accepted but not imposed under the Lieber Code.[256] Although the parole regime during the United States Civil War collapsed under the weight of reciprocal violations,[257] subsequent nineteenth and early twentieth century codifications, domestic[258] and international,[259] as well as the jurisprudence of the United States Supreme Court,[260] supported the moral basis for parole as well as the right of states to harshly punish violators. Violations of parole continued to excite moral outrage and, although most were punished with imprisonment at hard labor,[261] some were condemned to death.[262] During World War I, the custom of parole fell into desuetude after serial violations early in the conflict[263] and the subject was little revisited, apart from the context of restatements of domestic military manuals,[264] prior to World War II.[265]

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[253] *See id.* art. 126 ("Commissioned officers only are allowed to give their parole . . . ."); *id.* art. 127 ("No [enlisted soldier] can give his parole except through an officer. . . . The only . . . exception is where individuals, properly separated from their commands, [are] without the possibility of being paroled through an officer.").

[254] *See id.* art. 128 ("No paroling on the battle-field . . . is permitted . . . ."). Both the United States and the Confederate armies refused to recognize paroles granted on the battlefield on the ground that the duressive environment under which they were granted vitiated any validity they might otherwise have possessed. FLORY, *supra* note 154, at 130; *see also* U.S. War Dep't, General Order No. 100, § 7, art. 133 (1863) ("No prisoner of war can be forced by the hostile government to parole himself . . . .").

[255] *See* Lieber Code, *supra* note 12, art. 125 (requiring that names and ranks of paroled soldiers be memorialized and exchanged between governments).

[256] *Id.* art. 133. Because acceptance of the grant of parole was voluntary, the parolee continued to be obligated, upon his honor, to abide by the terms of his parole. *See* HALL, A TREATISE ON INTERNATIONAL LAW 425 (4th ed. 1895) (discussing legal obligations under parole). Paroles secured under the use of or threat of force were of no legal significance. *Id.*

[257] *See* Brown, *supra* note 240, at 205 (attributing the failure of the Civil War parole regime to the return to arms of 37,000 Confederate parolees and the execution of civilians sympathetic to the Confederacy).

[258] The military manuals of numerous states, including France, Germany, Japan and the United States, conferred jurisdiction upon military courts to try violations of parole and sentence those convicted to death. SPAIGHT, *supra* note 17, at 297 (citing sources) RULES OF LAND WARFARE (1914), *supra* note 201, arts. 72-82 (restating Lieber Code with respect to parole).

[259] *See* Project of an International Declaration Concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, art. 33 ("Any prisoner of war liberated on parole and recaptured bearing arms against the Government to which he had pledged his honour may be deprived of the rights accorded to prisoners of war and brought before the courts."); Hague Convention of 1907, *supra* note 96, art. 12 ("Prisoners of war liberated on parole and recaptured bearing arms against the

Thus, as of June 1944, POWs who accepted release upon the promise to refrain from further belligerency were expected to abide by their agreements; those who did not could expect death upon recapture.[266]

Government to whom they had pledged their honour . . . forfeit their right to be treated as prisoners of war, and can be brought before the courts.").

[260] *See* United States *ex rel.* Henderson v. Wright, 28 F. Cas. 796, 798 (W.D. Pa. 1863) (No. 16,777) (holding that parole is a "sacred obligation" the violation of which dishonors the national character and damages the "national faith").

[261] *See* SPAIGHT, *supra* note 17, at 296-97 (suggesting that by the late nineteenth century opinion was divided as to whether the appropriate punishment for a parole violator was death by hanging or strict confinement at labor).

[262] Military courts treated violations of parole as serious offenses: during the Boer War, parole violators were occasionally punished by death. *See* SPAIGHT, *supra* note 17, at 88 (discussing parole violations during the Boer War and noting the execution of a paroled Boer officer recaptured under arms in a British uniform). BRITISH MANUAL OF MILITARY LAW 298 (1884) (providing for death for violations of parole in "aggravating case[s]"); WELLS, *supra* note 12, at 152 ("Every [POW] who, having broken his parole, is recaptured with arms in hand, is punished with death." (citing the French Military Code art. 204, sec. 2)).

[263] Brown, *supra* note 240, at 208.

[264] For example, the revisions to the *Rules of Land Warfare* (1914) simply renumbered sections of the United States military regulations and added almost nothing of substance. *See* WELLS, *supra* note 12, at 152-53 (documenting the near-verbatim recodifications of the 1914 Rules in 1934 and 1940).

[265] *See* HALL, *supra* note 156, at 490 (glossing the question of parole in brief).

[266] Within the Martial Code as of 1944, the punishment for dishonor was commensurate with the crime, and for those who purported to resume the status of combatants after promising to surrender that status in exchange for their release, death was an appropriate sanction. KALSHOVEN, *supra* note 28, at 260-61.

c. Reprisal Against POWs

Belligerents have threatened and undertaken acts of reprisal[267] to deter and punish violations of the laws and customs of war, including the abuse of POWs,[268] throughout history. Enlightenment commentary expressed approval for the use of reprisals by otherwise law-abiding states as necessary to deter unlawful adversaries[269] and, during the American Revolution, the threat of reprisal was required to induce Britain to terminate its denial of quarter to and maltreatment of United States POWs.[270] In the United States Civil War the "infliction of retaliatory measures" against enemy POWs[271] was a permissible means to transform the conduct of the enemy.[272] Soldiers committing perfidious surrenders in World

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[267] "Reprisal" is a legal term describing an act undertaken to induce enemy forces to cease violating the rules and customs of war. *See generally* KALSHOVEN, *supra* note 28. A reprisal, if undertaken prior to an enemy violation, would constitute a violation of the laws and customs of war, whereas when done solely for the purpose of forcing an adversary to discontinue its prior violation, it may be adjudged legal or, at the very least, permissible. *Id.* Reprisals may consist of acts that mirror those of the adversary ("in kind") or other acts ("not in kind"), but resort to reprisal has been considered to require the failure of other means, formal notice to the adversary and limitation of otherwise illegal acts consistent with the requirements of proportionality.

[268] BARKER, *supra* note 164, at 196.

[269] HUME, *supra* note 1, at 20.

[270] *See* Coil, *supra* note 172, at 185-86, 191-92 (noting that threats of reprisals against British POWs were successful in protecting some United States POWs against execution); *see also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 796-97 (2d ed. 1920) (stating that a "right of relatiation" (i.e., reprisal) existed during the Revolutionary War in cases of the denial of quarter).

[271] Lieber Code, *supra* note 12, art. 59. Examples of reprisals explicitly permitted include the denial of quarter to troops that offer no quarter. *Id.* arts. 62, 66. Such resort was effective: in reprisal for Union executions of Confederate POWs, Confederate Lieutenant Colonel John Singleton Mosby ordered twenty-seven Union POWs to draw lots to determine which seven would be hanged in reprisal. To the corpses notes were pinned with the following text: "These men have been hung in retaliation for an equal number of Colonel Mosby's men, hung by order of General Custer at Front Royal. Measure for measure." Cited in Boyle, *supra* note 184, at 148-50.

[272] *See* Lieber Code, *supra* note 12, art. 27 (stating that "[a] reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage" than reprisal).

War I might expect to be eighter employed as human shields or summarily executed in retaliation upon their eventual capture,[273] and reprisals against POWs, including execution, were employed by the Allies and the Entente[274] and justified by scholars as necessary deterrent measures.[275] In the immediate aftermath of World War I, international efforts to limit reprisals against POWs failed to dislodge the settled practice of states in responding to and deterring injuries to their armed forces,[276] and diplomats settled for the requirement that reprisals against POWs be limited to where the act was justified as having been undertaken to protect POWs of the capturing state.[277] Thus, although the Geneva Conventions of 1929 purported to subvert the custom-based regime of reprisal and institute an absolute prohibition on reprisals against POWs,[278] this declaration made few inroads into the mass of state interests in deterring mistreatment of their own soldiers and, for the duration of World War II, reprisals remained relatively commonplace and practical measures were neither generally disfavored by nor inconsistent with the martial code.[279]

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[273] *See* FOOKS, *supra* note 143, at 121 n.2 (stating that, after the author, a British officer, came under fire from German machine gunners who feigned surrender only to inflict heavy casualties before their subsequent capture, the United States captors marched the German POWs before their advance to obtain a ceasefire from other German units).

[274] KALSHOVEN, *supra* note 28, at 136.

[275] *See* SPAIGHT, *supra* note 17, at 465 ("[T]he right to inflict reprisals—to retaliate—must entail the right to execute in very extreme cases. Otherwise there would be no effective means of checking the enemy's very worst excesses."); *see also* KALSHOVEN, *supra* note 28, at 74 ("[N]o army could reasonably be expected to renounce in war so effective and powerful a weapon for the redress or cessation of supposed intolerable wrong upon its own nationals at the hand of the enemy as immediate or threatened reprisal on enemy units within its own hands.") (quoting Chariman Lord Younger of the International Law Association at the Hague Conference on the Treatment of Prisoners of War, 1921).

[276] Domestic military manuals expressly permitted reprisal at the time of World War I. *See, e.g.*, RULES OF LAND WARFARE (1914), *supra* note 201, ¶ 383 ("Persons guilty of no offense whatever may be punished as retaliation for the guilty acts of others.").

[277] *See* International Law Association, 30th Conference, The Hague, 30 August-3 September 1921, Proceedings Concerning the POW Code: Report of the Conference by the Treatment of Prisoners of War Committee, Vol. I, art. 13, at 188-246 ("All reprisals, as such, on prisoners of war are deprecated . . . [POWs] shall in no case be subjected to reprisals except in retaliation for acts committed or sanctioned by their own Governments in connection with the treatment of [POWs].").

[278] *See* Geneva Convention of July 27, 1929, *supra* note 215, art. 2 (providing that "[m]easures of reprisal against [POWs] are forbidden").

4. The Court-Martial of Private Ryan

No disciplinary or judicial measures were taken against any of the characters in *Saving Private Ryan*. The most brutal eleven months of the war lay ahead and Allied efforts were tightly focused upon defeating the Nazi war machine. To have exposed soldiers to the threat of punishment in cases where allegations of misconduct would have been considered of questionable merit would have chilled the aggressiveness necessary for survival in combat and dulled the very instrument essential to victory. Even more importantly, by the standards of the martial code in June 1944, none of the acts or omissions were clearly colorable as prosecutable war crimes, and it is almost inconceivable that any commander would have investigated, let alone charged, any defendants.[280] Nevertheless, to develop the argument that the martial code is superior to international adjudication as arbiter of the moral and legal legitimacy of the conduct of soldiers in war as well as the sole mechanism of social control whereby the objects and purposes of IHL may be achieved without compromising the survivability of soldiers and the civilization they defend, this Article will analyze the likely result of a United States Army court-mar-

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[279] *See generally* ROBERT KATZ, THE BATTLE OF ROME: THE GERMANS, THE ALLIES, THE PARTISANS, AND THE POPE, SEPTEMBER 1943-JUNE 1944 (2003) (noting execution of eighty German POWs by French Partisans in reprisal for execution of eighty Partisans, as well as German execution of ten Italian POWs for every German soldier killed in the Battle of Rome in March 1944); Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 60-68 (1996) (noting pattern of reprisals against POWs during World War II).

[280] The Army routinely investigates various civil and criminal matters. *See* U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (Aug. 24, 1977). If no formal accusation is made, the issue may be disposed of by this informal investigative procedure. However, when a soldier is formally accused of a crime, the Uniform Code of Military Justice (UCMJ) requires a pretrial investigation unless it is waived by the accused. *See* 10 U.S.C. § 832 (2003) (providing for public adversarial hearing to determine whether charges should be proferred). Under the UCMJ, the convening authority has the ultimate discretion to determine whether to charge an accused subsequent to an Article 32 investigation, as the report of that investigation is merely advisory. *See* Everett, *supra* note 77, at 20. Moreover, the decision to launch an investigation, whether informal or formal, is a discretionary act driven not solely by legal considerations. *See* Christopher D. Booth, Note, *Prosecuting the "Fog of War?" Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by U.S. Forces During the Opening Days of the Korean War in the Village of No Gun Ri*, 33 VAND. J. TRANSNAT'L L.

933, 951 (2000) (quoting then Secretary of the Army Louis Caldera as stating that "[the Army] will not investigate every firefight, every battle" in which its soldiers might be alleged to have committed crimes). Commanders have indeed convened courts-martial to try members of their commands for serious violations of IHL, even during total wars such as World War II. *See, e.g.*, BISHOP, *supra* note 146, at 286 (noting numerous courts-martial records of members of the United States Armed Forces under the UCMJ for the deliberate killing of POWs); RICHARD WHITTINGHAM, MARTIAL JUSTICE: THE LAST MASS EXECUTION IN THE UNITED STATES 259 (1971) (referencing the court-martial of United States Army Private Clarence Bertucci for the deliberate killing of eight sleeping German POWs in a detention camp in Utah). However, the decision to convene a court-martial hinges, at least in part, upon the political purposes and risks at issue. For example, in the waning days of World War II, United States Army troops executed most of the SS guards at the Dachau extermination camp, yet, upon learning of the massacre, their commanding general, General George S. Patton, made the prudential decision not to investigate the matter lest it cause embarrassment to the Allies and blur the moral distinction between the forces of liberation and those of subjugation. *See* HOWARD A. BUECHNER, DACHAU: THE HOUR OF THE AVENGER (1994) (reporting that Patton rejected the proposal to court-martial the United States soldiers with the following words: "Public outrage would certainly have opposed the prosecution of American heroes for eliminating a group of sadists who so richly deserved to die."). In contrast, although the Confederate commandant of the Andersonville POW camp, Captain Henry Wirtz, did his best to improve the miserable prison conditions he inherited from his predecessor, the United States court-martialled him for unlawful reprisal against POWS because the public mood after a long and bloody war needed a scapegoat. WELLS, *supra* note 12, at 3-4. Commanders are understandably loathe to trigger judicial proceedings, the politico-military ramifications of which are unpleasant, for courts-martial serve purposes in addition to the administration of criminal justice, and thus it is solely within the discretion of the commander to determine whether a soldier will be investigated, as well as whether he will be tried and, if convicted, punished. *See* ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 73 (1969) (explaining that a court-martial is a not a judicial forum but an "instrumentality of the executive power of the President for the enforcement of discipline in the armed forces" that permits broad exercise of discretion); THE LAW OF LAND WARFARE (1956), *supra* note 43, ¶ 507(b) (locating prosecutorial authority and discretion in the commander); U.S. DEP'T OF ARMY, FUNDAMENTALS OF MILITARY LAW 58 (1980) (describing breadth of discretion of convening authority with respect to trial and sentencing).

tial[281] of Private Ryan and other members of the rescue squad on charges of denial of quarter and reprisal against the German POW for violation of parole. The substantive elements of the crimes with which defendants might have been charged will be those as they existed in 1944.[282] However,

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[281] States derive their ultimate military jurisdiction "from the bare fact that the person charged is within the custody of the Court; his nationality, the place where the offence was committed, the nationality of the victims are not generally material." 15 UN WAR CRIMES COMM'N, *supra* note 43, at x. However, the sources of and authority for the military jurisdiction of the United States are augmented by custom stretching back to Rome, by the Constitution and by positive legislation. English courts-martial borrowed liberally from Roman law, and in turn the Continental Congress, during and subsequent to the American Revolution, adopted much of the English system to regulate the relationship between members of the Armed Forces and the U.S. DEP'T OF ARMY, FUNDAMENTALS OF MILITARY LAW, *supra*, at 1. With Article I, Section 8, Clause 14, the Framers of the United States Constitution conferred upon Congress the power to "make Rules for the Government and Regulation of the land and naval Forces," and recognized that the exigencies of military discipline would require a special system of military courts distinct from Article III courts. *See* U.S. CONST. amend. V (exempting "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury); *see also* O'Callahan v. Parker, 395 U.S. 258, 261-62 (1969), *overruled on separate grounds by* Solorio v. United States, 483 U.S. 435 (1987) (recognizing the constitutional bases for congressional authority to create a system of military justice distinct from civil justice (citing *Ex parte* Quirin, 317 U.S. 1, 40 (1942))). In 1951, Congress exercised this constitutional grant and enacted the UCMJ to regulate the conduct of all Armed Forces personnel and to define and provide for the punishment of crimes which, but for the military status of the accused, would be tried and punished under applicable federal or state law. *See* 10 U.S.C. §§ 801-946. By executive order in 1984, the *Manual for Courts-Martial* was created to aid in the application and interpretation of the UCMJ and to provide rules of evidence and procedure. *See* Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984) (amended most recently Apr. 11, 2002). In addition, the respective service secretaries of the military components promulgate regulations governing the administration of military justice to which personnel are subject in accordance with 10 U.S.C. § 3012, and the decisions of Courts of Military Review, the United States Court of Military Appeals (the "Supreme Court of the Military"), general and special orders of the Department of Defense and of post and combat commanders and military customs complement and conclude the sources of law applicable to courts-martial. 3 AUSTIN WAKEMAN SCOTT, HANDBOOK OF MILITARY LAW (1918).

[282] The term "war crime" is a legal term-of-art for a "violation of [IHL] by any person . . . , military or civilian[, and] [e]very violation of [IHL] is a war crime." THE LAW OF LAND WARFARE (1956), *supra* note 43, ¶ 499; *see also* 11 UN WAR CRIMES COMM'N1, *supra* note 43, at 1241 (identifying "war crimes" as a species of "international crime," defined as act "universally recognized as criminal, which

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[are] considered . . . grave matter[s] of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state"). IHL, as part of the "law of nations" to which Article I, Section 8 of the United States Constitution makes reference, is part of the law of the United States even in the absence of specific incorporation, provided it is not in conflict with a treaty or statute or a previous executive or judicial determination. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (establishing that customary international law is part of the law of the United States "where there is no treaty and no controlling executive or legislative act or judicial decision"). However, subject matter jurisdiction over allegations of violations of IHL by members of the Armed Forces, otherwise known as "war crimes jurisdiction," is slightly more complex. Although the doctrine of self-execution of treaties is beyond the scope of this Article, it suffices to note that IHL instruments have been interpreted as non-self-executing agreements that require specific domestic implementing legislation incorporating their provisions in domestic law as a further condition in order to create obligations binding in United States courts, including courts-martial. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part on other grounds*, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (incorporating the doctrine of self-execution in U.S. law); United States v. Noriega, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (holding the Geneva Conventions and other IHL instruments to be non-self-executing agreements that did not create a cause of action in United States courts independent of domestic implementing legislation). Moreover, rather than attempt the complex task of codification and specific incorporation of IHL, Congress has chosen to incorporate by reference in the UCMJ and, consequently, an analysis of evolving external sources is required to determine jurisdiction over offenses and persons in a particular case. *See* 10 U.S.C. § 818 (providing that "courts-martial [shall] . . . have jurisdiction to try any person who by the law of war is subject to [the UCMJ] and may adjudge any punishment permitted by the law of war"); *see also In re* Yamashita, 327 U.S. 1, 7-8 (1946) ("[Congress] had incorporated, by reference, . . . all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction."); *Ex Parte* Quirin, 317 U.S. 1, 26 (1942) (holding that the incorporation of IHL treaties and customary IHL by reference is a permissible exercise of Congressional Article I, Section 8, Clause 7 authority to "define and punish . . . Offenses against the Law of Nations"). Accordingly, United States policy is to charge soldiers with violations of the UCMJ, rather than with violations of IHL and, as such, the court-martial proceeding is an adjudication under domestic, rather than international, law. *See* THE LAW OF LAND WARFARE (1956), *supra* note 43, ¶ 507(b) ("Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the [UCMJ] and, if so, will be prosecuted [within the United States] under that Code."); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(2) (2000) (explaining that "[o]rdinarily persons subject to the [UCMJ] should be charged with a specific violation of the [UCMJ] rather than a violation of the law of war"); Levie, *supra* note 142, at 3 n.29 (stating that, strictly speaking, courts-martial apply to United States, and not international, law). The War Crimes Act of 1996, which provides that "grave breaches" of the Geneva Conventions of 1949 are punishable under federal law, theoretically creates independent war crimes jurisdiction in Article III courts, and it provides that grave breaches of any of the Conventions are punishable by jail or death.

See War Crimes Act of 1996, 18 U.S.C. § 2441 (2003) (stating that the United States incorporates into domestic law the "grave breaches" provisions of the Geneva Conventions as prescribing punishable war crimes); *see also* William Jefferson Clinton, Statement on Signing the War Crimes Act of 1996, 2 Pub. Papers 1323 (Aug. 21, 1996) (stating that the War Crimes Act "provides the United States with clearer authority to prosecute violations of the laws of war"). However, in practice, any alleged acts or omissions that would constitute grave breaches of the Geneva and Hague Conventions are expressly outlawed only in the United States military manual and are charged and prosecuted under relevant provisions of the UCMJ. *See* THE LAW OF LAND WARFARE (1956), *supra* note 43, ¶ 504. Prohibited, as additional violations of the law of war, include:

> *a*. Making use of poisoned or otherwise forbidden arms or ammunition.
> *b*. Treacherous request for quarter.
> *c*. Maltreatment of dead bodies.
> *d*. Firing on localities which are undefended and without military significance.
> *e*. Abuse of or firing on the flag of truce.
> *f*. Misuse of the Red Cross emblem.
> *g*. Use of civilian clothing by troops to conceal their military character during battle.
> *h*. Improper use of privileged buildings for military purpose.
> *i*. Poisoning of wells or streams.
> *j*. Pillage or purposeless destruction.
> *k*. Compelling prisoners of war to perform prohibited labor.
> *l*. Killing without trial spies or other persons who have committed hostile acts.
> *m*. Compelling civilians to perform prohibited labor.
> *n*. Violations of surrender terms.

Id.; *see also* Robinson O. Everett, *Did Military Justice Fail or Prevail?*, 96 MICH. L. REV. 1421, 1434 (1998) (reviewing GARY D. SOWS, SON THANG: AN AMERICAN WAR CRIME (1997) (stating that, in practice, the UCMJ is the only viable procedure whereby to prosecute an accused service member and that to proceed under the War Crimes Act would still necessitate resorting to the UCMJ). The United States does take an expansive view of its treaty-based obligations with respect to prosecuting violations of treaty-based IHL, despite its disfavor for direct incorporation and its preference for implementing legislation. *See* THE LAW OF LAND WARFARE (1956), *supra* note 43, ¶¶ 498-511 (stating that it is the intent of the United States to follow the Geneva Conventions of 1949 regardless of whether or not the treaty is legally binding upon or followed by the enemy nation). Nonetheless, breaches of customary IHL are not specifically addressed in any positive source of military law, although Congress retains the authority to prescribe with respect to "offenses against the Law of Nations," and arguably has an international legal obligation to do so, although the manner in which it chooses to incorporate customary IHL remains its prerogative. For an extended discussion of domestic jurisdiction over alleged violations of IHL, see generally Michael L. Smidt, Yamashita, Medina, *and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000). Because the corpus of IHL is in a constant state of flux, it is essential to distinguish the body of law applicable in 1944 from that because the rules of court-martial have evolved in the intervening years, and as this analysis is undertaken in support of the claim that the contemporary system of courts-martial, as the institutionalization of the martial code, is more suitable to the defense of law and civilization in the ongoing war on terror than is the ICC, the court-martial of Private Ryan will observe the procedures and structure of contemporary court-martial, proceedings.[283] The contraposition of the likely re-

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applicable in 2003 to evaluate the extent to which Private Ryan and others discharged their legal obligations with respect to the UCMJ and its forebears, the manner in which the regime of courts-martial would address any delict and the contemporary compatibility of this regime with the joint defense of law and civilization.

[283] Prior to 2000, Private Ryan would have been, by virtue of his discharge from the United States Army, immune from court-martial for any transactions occurring in 1944, irrespective of the question of any applicable statutes of limitations because as under existing law only active-duty personnel were subject to court-martial, and discharged members of the Armed Forces could not be recalled involuntarily to active duty unless they were entitled to receive retired pay, which is generally paid only to those who have served more than twenty years on active duty. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 (1955) (holding that Congress lacked the power to subject civilians to trial by court-martial who had "severed all relationship with the military," regardless of prior military status or the nature of the crime); Willenbring v. Neurater, 48 M.J. 152, 158 (C.A.A.F. 1998) (upholding *Toth*); BISHOP, *supra* note 146, at 63, 292 (discussing long-standing opposition with the Department of the Army to proposed amendments to this jurisdictional gap to permit court-martial of honorably discharged service personnel). Despite a 1968 General Assembly resolution declaring statutes of limitations inapplicable with respect to war crimes, the U.S., while it has expressed support for expansive jurisdiction over war crimes in theory, has never recognized any obligations under international law with respect to the waiver of otherwise applicable statutes of limitations or other impediments to jurisdiction in cases such as that of Private Ryan et al., nor are commentators inclined to suggest that such non-applicability has ripened into customary international law. *See generally* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 U.N. GAOR, 23d Sess., 1727th Mtg., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) (prohibiting applicability of any statute of limitations for grave breaches enumerated in the Geneva Conventions of 1949) (signed by only forty-one states but not by the U.S.); *see also* Scott R. Morris, *Killing Egyptian Prisoners of War: Does the Phrase 'Lest We Forget' Apply to Israeli War Criminals?*, 29 VAND J. TRANSNAT'L J. 903, 910-20 (1996) (disputing claims that the non-applicability of statutes of limitations for war crimes or crimes against humanity is part of CIL). For a thorough discussion, see generally Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476 (1971).

However, a transnational trend in favor of waiving statutes of limitations sults of a court-martial, wherein current substantive laws governing parole and reprisal are applied, offers evidence in further support of this claim.

a) United States v. Private Ryan, July 1944

On July 5, 1944, following an Article 32 investigation[284] sparked by a *New York Times* article under the byline of a reporter who had accompanied the 101st Airborne Division into Normandy and described in detail the Battle of Ramelle, including the shooting of the German POW "in cold blood," the commanding general of the 29th Infantry Division, Major

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with respect to war crimes garnered judicial and Congressional notice. *See, e.g.*, Handel v. Artukovic, 601 F. Supp. 1421, 1430 (D. C. Cal. 1985) (noting that the U.S. officially favored the Non-Applicability Convention even if it had not signed the instrument). Over Army objections, with the Military Extraterritorial Jurisdiction Act (MEJA) Congress expanded the scope of federal criminal jurisdiction over war crimes to include civilian personnel as well as discharged former military personnel, although the latter category of defendants is still entitled to court-martial as opposed to an Article III court, and waived the constructive statute of limitation imposed by way of the more limited personal jurisdiction predating the Act. *See* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261(a) (2000) (creating jurisdiction in Article III courts over civilian personnel alleged to have committed war crimes while accompanying the United States Armed Forces overseas); *id.* § 3261(c) (providing that such jurisdiction is complementary to courts-martial); *id.* § 3261(d) (expanding personal jurisdiction of courts-martial to include discharged military personnel accused of having committed prosecutable offenses while members of the Armed Forces but not previously tried by court-martial or by a foreign government). If the MEJA were invoked as the basis for jurisdiction, Private Ryan and others might have defenses on constitutional as well as common law grounds were they to assert that they are not members of the "land or naval forces, or in the Militia." *See* U.S. CONST., amend. V (providing that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."); *see also* U.S. v. McDonagh, 14 M.J. 415, 419 (C.M.A. 1983) (holding that retroactive application of a criminal statute by courts-martial violates the Ex Post Facto Clause, as does retroactive application of a judicial construction of a statute) (citing U.S. CONST., amend. V). Similarly, any evidentiary or ethical problems triggered by the trial of "'old men' for crimes committed [sixty years] ago" is beyond the scope of this Article. Hilaire McCoubrey, *The Concept and Treatment of War Crimes*, 1 J. ARMED CONFLICT L. 121, 133 (1996) (discussing ethical and evidentiary issues associated with long-delayed war crimes prosecutions).

[284] *See* R.C.M. 405 (governing procedural rules in Article 32 investigations).

General Charles Gerhardt, reluctantly ordered the courts-martial of Private Ryan, PFC Reiben and T/5 Upham.[285] T/5 Upham was charged with a violation of Article 118 of the UCMJ, "Murder," for shooting the German machinegunner he had taken prisoner in Ramelle.[286] PFC Reiben was not charged with a violation of Article 118 for denying quarter to surrendering Germans on the bluffs overlooking Omaha Beach because the prosecution determined that there was not sufficient evidence to sustain a conviction;[287] however, Reiben was charged with a violation of Article 128, "Assault," for his physical abuse of the German machinegunner subsequent to capture and of Article 134, "Misprision of Serious Offense," for concealing violations by Private Ryan and T/5 Upham.[288] Private Ryan was charged with a violation of Article 134 for concealing the commission of violations by T/5 Upham. The defendants were arrested and confined in late June 1944,[289] informed of the charges,[290] advised of their rights and appointed defense counsel.[291] At arraignment,[292] the defendants each entered a plea of not guilty.[293] Shortly after the arraignment, Private Ryan refused a grant of immunity to testify against T/5 Upham.[294]

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[285] A general court-martial can be convened only by the President, the secretary of a military service or a senior commanding officer. 10 U.S.C. §§ 822 (2000). To protect the substantive rights of the accused, the convening authority cannot also be the accuser. *Id.* § 822(b). For this reason, each convening authority is advised by an experienced attorney. *Id.* § 834.

[286] Article 118 of the UCMJ provides in pertinent part that

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he . . . has a premeditated design to kill; . . . intends to kill or inflict great bodily harm; . . . [or] is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life . . . shall suffer death or imprisonment for life as a court-martial may direct.

10 U.S.C. § 918 (2000). Lesser included offenses under Article 118 include (in)voluntary manslaughter, negligent homicide, and assault with intent to commit murder or manslaughter. *Id.* Article 119 of the UCMJ, "Manslaughter," provides that conviction can occur where

> (b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—(1) by culpable negligence; or (2) while perpetrating or attempting to perpetrate an offense, other than those . . . in [Article 118], directly affecting the person; is guilty of involuntary manslaughter and shall be punished as a court-martial shall direct.

10 U.S.C. § 919 (2000).

[287] All of the potential prosecution witnesses to the events that might have led to an Article 118 prosecution of PFC Reiben—United States soldiers who made the Omaha landings and the German soldiers who contested them—were dead as of July 1944. Had there been an available eyewitness, the prosecution may have charged PFC Reiben as well with a violation of Article 118, "Murder," for denying quarter to the German defenders on Omaha Beach.

[288] *See* 10 U.S.C. § 934 (2000) (providing for punishment at discretion of a court-martial for wrongful concealment of the commission of a serious offense by

The trial judge denied defendants' motions to dismiss on the ground that the specifications failed to state offenses,[295]

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another that is prejudicial to the good order and discipline of the Armed Forces). Failure to report the commission of a violation of the "law of war" is a violation of Department of the Army regulations. *See* U.S. DEP'T OF ARMY, Reg. 350-4, TRAINING IN UNITS, ch. 14 (Mar. 19, 1933) (requiring, inter alia, that "[s]oldiers report all violations of the law of war to their superiors.").

[289] *See* R.C.M. 305 (providing for pretrial confinement of the accused).

[290] *See* R.C.M. 308, 602 (providing for notification to the accused of charges against him).

[291] *See generally* UNITED STATES LAW AND THE ARMED FORCES: CASES AND MATERIALS ON CONSTITUTIONAL LAW, COURTS-MARTIAL, AND THE RIGHTS OF SERVICEMEN (Willis E. Schug ed., 1972) (detailing the extensive procedural protections of the accused in court-martial proceedings); *see also* United States v. Tempia, 37 C.M.R. 249, 253 (C.M.A. 1967) (stating in dictum that much of the Bill of Rights is applicable to defendants in courts-martial proceedings). Among other aspects of the due process accorded the accused in a court-martial is the entitlement to civilian counsel. *See* R.C.M. 506. United States courts-martial provide more extensive safeguards to defendants than the civil legal systems of the vast majority of states and greater protections than those afforded at international tribunals. *See* Mark S. Martins, Comment, *National Forums for Publishing Offenses Against Informational Law: Might U.S. Soldier Have Their Day in Court?*, 36 VA. J. INT'L L. 659, 673-74 (1996) (discussing safeguards afforded defendants in courts-martial and comparing these with other fora).

[292] *See* R.C.M. 904 (governing arraignment).

[293] *See* R.C.M. 910 (listing possible pleas and providing for procedural safeguards).

[294] *See id.* at Rule 704 (governing grants of immunity). Where the ability of the United States to obtain a conviction is uncertain, it is not uncommon for the government to offer a grant of immunity in exchange for testimony, although the perception this permits wrongdoing to go unpunished is particularly acute in cases of war crimes. For a recent discussion of the political and legal issues attendant to the question of a grant of immunity in courts-martial adjudicating allegations of war crimes, see Booth, *supra* note 280, at 952.

[295] See R.C.M. 907 (providing procedures for a motion to dismiss on grounds of a lack of jurisdiction over the person or the offense or that the specification does not state an offense).

and after other preliminary matters, including the pretrial orientation of the members of the court conducted by General Truscott,[296] the common trial commenced[297] before a panel of five members, two of whom were enlisted soldiers.[298] As all defendants stipulated to the facts as presented in the specification of charges,[299] the prosecution was relieved of the potential embarrassment of having to call as witnesses enemy POWs. However, each defendant offered a series of affirmative defenses[300] to the charges and submitted a witness list that included experts to testify in support of these defenses.[301] All defendants offered the defense of ignorance or mistake of fact as to the criminality of the offenses with which they were charged,[302] while T/5 Upham and PFC Reiben offered the defenses of justification, obedience to orders and lack of mental responsibility. The prosecution, relying on the stipulation of the defendants that Upham had killed the German POW, in the presence of the other two defendants, that PFC Reiben had physically abused the German POW and that neither PFC Reiben nor Private Ryan had reported the events leading to the charges against other defendants that they had witnessed, presented a brief and direct case-in-chief to prove the unlawfulness of defendants' actions.

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[296] The Manual for Courts-Martial was amended in 1969 to reduce the influence of the convening authority upon the court and enhance the perceptions of its impartiality, although some suggest that the practice of pretrial orientation of the court for the purpose of influencing its decisionmaking continues. *See* SHERRILL, *supra* note 280, at 77.

[297] *See* R.C.M. 812 (providing for joint and common trials of defendants and stating that "each accused shall be accorded the rights and privileges as if tried separately.").

[298] The Sixth Amendment right to trial by a jury of peers is inapplicable to courts-martial. *Ex Parte* Quirin, 317 U.S. 1, 39-45 (1942); *see also* United States v. Loving, 41 M.J .213, 285, 287 (C.A.A.F. 1994), *aff'd on other grounds*, 517 U.S. 748 (1996); United States v. Curtis, 32 M.J. 252, 267 (C.M.A. 1991), *cert. denied,* 502 U.S. 952 (1991). Accused servicemembers are instead tried at general court-martial by a panel of at least five service members who are chosen by the commander who convenes the court-martial on a "best qualified" basis. *See* 10 U.S.C. § 825(d)(2) (2000); United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1987). In the event an enlisted soldier so elects, a minimum of one-third of the jury must be enlisted personnel. R.C.M. 805.

[299] R.C.M. 811 (providing that parties may stipulate to any fact, written statement or testimony of a witness).

[300] *See* R.C.M. 916 (describing a defense as an admission of the commission of the objective acts constituting the offense charged but denying criminal responsibility); *id.* (listing available affirmative defenses, including justification, obedience to orders, self-defense, accident, entrapment, coercion, inability, ignorance and lack of mental responsibility).

[301] *See* R.C.M. 703 (governing the employment of expert witnesses).

[302] *See id.* R.C.M. 916(j) (providing that "it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.").

With respect to T/5 Upham, the prosecution introduced into evidence relevant provisions of the Rules of Land Warfare (1940),[303] the Geneva Conventions of 1929[304] and the Hague Convention of 1907[305] to establish that the denial of quarter and the execution of POWs were categorical violations of IHL as it existed at the time of the alleged offenses for which defenses were unavailable as a matter of law.[306] Even military necessity could ever justify the extrajudicial killing of POWs,[307] the prosecution further argued, it was a defense unavailable to Upham, who could have availed himself of alternative, non-lethal methods of preventing the harms that

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[303] RULES OF LAND WARFARE (1940), *supra* note 216, ¶ 33 (surrendering enemy personnel are generally entitled to quarter).

[304] *See* Geneva Convention of July 27, 1929, *supra* note 215, art. 2 (stating that POWs "shall at all times be humanely treated and protected, particularly against acts of violence" and "[m]easures of reprisal against them are forbidden.").

[305] *See* Hague IV, *supra* note 96, art. 23(c) ("It is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.").

[306] The argument that the denial of quarter and the extrajudicial killing of POWs is absolutely prohibited was made before the International Military Tribunals at Nuremberg and Tokyo and before other United States military tribunals and commissions adjudicating the guilt of Nazi and Japanese defendants charged with the denial of quarter and the killing of United States POWs in the period from 1944-1951. *See, e.g.*, Nazi Conspiracy and Aggression: Opinion and Judgment 57 (1947) (refusing to consider defenses and sentencing the authors and executors of the Kommand Befehl and the execution of Allied POWs to death); *The Jalvit Atoll Case*, *in* 1 U.N. WAR CRIMES COMM'N, *supra* note 43, at 71 (sentencing the commander of Japanese naval forces who executed United States POWs to death for violation of Article 23(c) of Hague IV and Article 2 of the Geneva Convention of June 27, 1929); *The Essen Lynching Case*, *in* 1 U.N. WAR CRIMES COMM'N, *supra* note 43, at 88 (sentencing German officer to death for permitting a crowd to kill 3 British POWs); *The Dostler Trial*, *in* 1 U.N. WAR CRIMES COMM'N, *supra* note 224, at 22 (convicting commander of the German 75th Army Corps, General Anton Dostler, for ordering summary execution of fifteen uniformed United States POWs captured while on a mission to demolish a railway tunnel between La Spezia and Genoa); *Abbaye Ardenne Case*, *in* 4 U.N. WAR CRIMES COMM'N, *supra*4 note 224, at 97 (condemning commander of a Nazi SS Regiment for counseling his men to deny quarter to Allied troops); *Trial of Gunther Thiele and Georg Steinert*, *in* 3 U.N. WAR CRIMES COMM'N, *supra* note 43, at 56-57 (convicting two

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members of a German unit for denial of quarter to a wounded United States officer); *The Dreierwalde Case*, *in* 1 U.N. WAR CRIMES COMM'N, *supra* note 224, at 81 (same); *Trial of Albert Bury and Wilhelm Hafner*, *in* 3 U.N. WAR CRIMES COMM'N, *supra* note 43, at 62; *Trial of Anton Schosser*, *in* 3 U.N. WAR CRIMES COMM'N, *supra* note 43, at 65 (same); *Trial of Major Karl Rauer*, *in* 4 U.N. WAR CRIMES COMM'N, *supra* note 43, at 113 (same); *The Hostage Case*, 11 TRIALS OF WAR CRIMINALS, *supra* note 43, at 1230 (rejecting applicability of defenses and convicting principals and accessories of, inter alia, denial of quarter to Allied POWs).

[307] To permit necessity to trump the "accepted usages of civilized nations" would, in the words of the IMT, "eliminate all humanity and decency . . . the conduct of war." *The High Command Case*, *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 43, at 462, 492 [hereinafter *The High Command Case*]; *see also The Einsatzgruppen Case*, *in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 43, at 1317 (holding that recognition of an expansive view of military necessity urged by the defense would cause "the rules of war . . . [to] quickly disappear."). Unless incorporated into the positive law, the defense of military necessity to a violation of the customs of war was, according to the United States at the time of the post-World War II war crimes trials, absolutely unavailable. *See The Justice Case*, *in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 43, at 954, 1127 (holding that military necessity may serve as a defense only where expressly incorporated into specific provisions of IHL). The very specific question of whether military necessity could every justify derogation from the martial code, to include proscription against the denial of quarter or execution of POWs, was reached by United States and international military tribunals in several post-World War II trials and answered invariably in the negative. *See, e.g.*, *Trial of Lieutenant-General Baba Masao*, *in* 11 U.N. WAR CRIMES COMM'N, *supra* note 222, at 56 (rejecting defense of military necessity to the charge of denial of quarter despite evidence that an Allied landing was anticipated, and did in fact occur, in the area of operations from whence United States POWs were forcibly removed and killed); *The Peleus Trial*, *in* 1 U.N. WAR CRIMES COMM'N, *supra* note 224 (convicting a German submarine commander of denial of quarter to the survivors of a sunken ship despite evidence that Allied air surveillance might otherwise have spotted the survivors and led to the detection and destruction of his submarine). The case of *Thiele and Steinert* is even more squarely on point with respect to the position of the prosecutor in U.S. v. Ryan et al.: members of a small German unit surrounded by numerically superior United States troops who killed a United States POW to avoid detection and probable death were convicted of denial of quarter under the Hague and Geneva Conventions by a court-martial that rejected military necessity as absolutely unavailable. *Trial of Gunther Thiele and Georg Steinert*, *in* 3 U.N. WAR CRIMES COMM'N, *supra* note 224, at 56.

Upham asserted the execution of the POW had been undertaken to prevent. Specifically, Upham might have bound or otherwise secured the POW, disabled him in some fashion or simply released all the POWs unharmed.[308] The prosecution called the eminent scholar Hersch Lauterpacht, who testified that under IHL as it existed at the time of the alleged offense, defenses to the denial of quarter were categorically unavailable.[309] A second prosecution expert—a former British infantry officer and law professor at Oxford—testified that the defense of military necessity was applicable only to acts undertaken under circumstances where compliance with the law was a "genuine material impossibility,"[310] and that Upham either could have complied with the obligation to grant quarter or else was obligated to release surrendering German troops on parole.

In regard to the proffered defense of superior orders, the prosecutor argued against its applicability with respect to war crimes and contended that, even if it applied, not only was the killing of enemy POWs not within the scope of the orders given to Upham[311] but even if such an action could have been reasonably construed otherwise, whether as a reprisal or on other grounds, it was an illegal order[312] that Upham knew or should have known was illegal[313] and thus he was duty-bound, as a matter of transnational military custom[314] as well as United States military regulations,[315] to disobey. To the defense of a lack of mental responsibility,[316] the prosecutor argued that, even conceding that he was profoundly enraged by the perfidy of the German POW and the death of Captain Miller, T/5 Upham retained sufficient mental responsibility that, in conjunction with the presumption of mental responsibility that attaches to every soldier, he was disqualified from offering this defense.[317] Finally, the prosecution attempted to prove that, by virtue of the extensive United States Army regulations governing the laws of land warfare and the manifest illegality of his actions, T/5 Upham either knew or should have known that killing an enemy POW rendered hors de combat was categorically illegal. Experts—military psychiatrists and professors of military law—testified for the prosecution with respect to all aforementioned defenses.

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[308] *See* OSIEL, *supra* note 23, at 132-33 (suggesting that the question of liability for denial of quarter turns on whether non-lethal alternatives, such as the disabling of the POWs by bindings, were reasonably available).

[309] *See* 2 OPPENHEIM'S INTERNATIONAL LAW 183-84 (H. Lauterpecht ed., 6th ed. 1943) (categorically rejecting any defenses to the charge of denial of quarter).

[310] *See* McCoubrey, *supra* note 283, at 135 (suggesting that in the situation where a submarine commander is unable to carry out search-and-rescue operations on behalf of the survivors of a torpedoed vessel due to his vulnerability to detection while on the surface, he may avail himself of the defense of military necessity to the charge of denial of quarter as compliance with the obligation to rescue would constitute a "genuine material impossibility").

[311] Captain Miller issued verbal, and not written, orders to the rescue squad, and the defense stipulated to the fact that the orders did not specifically authorize the killing of enemy POWs or any derogations from the laws of war.

[312] The prosecutor read Article 2 of the Geneva Convention of July 27, 1929, *supra* note 215, providing that POWs are "in the power of the hostile Government, but not of the individuals or formation which captured them," and forbidding "[m]easures of reprisal against them" into the record to establish the categorical illegality of reprisals under IHL and that Upham could not characterize his actions to have been a legal reprisal against the German POW.

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[313] *See* R.C.M. 916(d) (providing that if a defendant knows an order to be illegal or a "person of ordinary sense and understanding would have known the orders to be unlawful," he is obligated to disobey).

[314] The post-World War II jurisprudence of the Nuremberg and Tokyo tribunals authoritatively established the position of the Allies that, notwithstanding any contrary domestic practice, a "[s]oldier is bound to obey only the lawful orders of his superiors," and "[i]f he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it." *The Jaluit Atoll Case*, *in* 1 U.N. WAR CRIMES COMM'N, *supra* note 306, at 5 (citing United States v. Carr, 25 F. Cas. 306, 307-08 (1872)); *see also The Dostler Case*, *in* 1 U.N. WAR CRIMES COMM'N, *supra* note 224 (rejecting a superior orders defense to the charge of denial of quarter on the ground that such a defense was unavailable under IHL and that the accused had a duty to disobey the unlawful order); *The Hostage Case*, *supra* note 43 (rejecting the availability of a superior orders defense as the "rule that a superior order is not a defense to a criminal act is a rule of fundamental justice that has been adopted by civilized nations extensively" and only lawful orders are entitled to obedience). Moreover, the formal rules of procedure and evidence promulgated by the Allies to govern prosecution of German and Japanese war crimes cases utterly proscribed application of the superior orders defense. *See generally* Albert Lyman, *A Reviewer Reviews the Yokohama War Crimes Trials*, 17 J. D.C. B. ASS'N 267-280 (1950).

[315] *See, e.g.*, Court-Martial of General Jacob H. Smith, Manila, Philippines, April, 1902, S. Doc. 213, 57th Cong, 2nd Sess., 5-17 (1902) (convicting commander of United States expeditionary force in the Philippines, Brigadier General Smith, of a violation of good conduct and discipline for issuing orders in violation of Article 60 of the Lieber Code that suggested it would be permissible to deny quarter); *see also* 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 187 (1906) (discussing the Smith court-martial and the issue of unlawful orders). A mere eight months before the courts-martial of Private Ryan the section of the 1940 Rules of Land Warfare concerning the defense of superior orders was rewritten to relegate it from the status of a complete defense to a qualified defense inapplicable to the denial of quarter. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE ¶ 345.1 (1944) [hereinafter RULES OF LAND WARFARE (1944)] (providing that "the fact that [offenses against the "laws and customs of war"] were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."). The purpose of the 1944 revision, made at the order of General George C. Marshall—the source of the orders to rescue Private Ryan—was to harmonize regulations governing the conduct of United States Armed Forces with those the Allies had proposed would govern the prosecution of German and Japanese soldiers who, it was anticipated, would claim to have been following superior orders. WELLS, *supra* note 12, at 10.

[316] *See* R.C.M. 916(k) (providing that it is an affirmative defense if at the time of an offense an accused was "unable to appreciate the nature and quality or the

In the case against PFC Reiben, charged with assault in violation of Article 128 and misprision of a serious offense in violation of Article 134 for concealing the commission of violations of the UCMJ by Private Ryan and T/5 Upham, the prosecution presented its case first as to the assault charge. The prosecution attacked the defenses of justification based on military necessity, obedience to orders and lack of mental responsibility on grounds virtually identical to those in the case against Upham. The prosecution contended that no exigent circumstances required PFC Reiben to cause bodily harm to the German POW[318] subsequent to his capture because there was no imminent threat from other enemy forces, and United States troops outnumbered the sole surviving German, who offered no physical resistance. The prosecution further argued that neither PFC Reiben nor any other member of the rescue squad had received orders instructing them to mistreat enemy POWs, and that notwithstanding the influence of the emotions associated with the death of T/5 Wade, PFC Reiben presumptively retained sufficient responsibility for his actions

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wrongfulness of his other acts" by virtue of a "severe mental disease or defect").

[317] *See* R.C.M. 916(k)(2) (providing that "[a] mental condition not amounting to a lack of mental responsibility . . . is not a defense"); R.C.M. 916(3)(A) (providing that an accused is "presumed to have been mentally responsible.").

[318] *See* 10 U.S.C. § 928(a) (2000) (providing that the elements for assault are the attempt to cause physical harm to another through the use of unlawful force or violence).

and could not assert the defense of lack of mental responsibility as a matter of law. With respect to the misprision charge, the prosecutor supplemented the stipulation, in which PFC Reiben stated that he had observed T/5 Upham shoot the German POW but had not subsequently reported the shooting, with evidence that PFC Reiben either knew or should have known that Upham's actions were criminal, that PFC Reiben had the opportunity but did not elect to report and that under United States military regulations the denial of quarter is a serious offense.[319] The prosecution effectively made an identical case against Private Ryan on the misprision charge and then rested.[320]

Following a brief recess, the defendants' joint motion for a finding of not guilty was denied,[321] and the defendants presented their case. T/5 Upham testified that he was justified in shooting the German POW on the ground of military necessity. According to Upham, his squad had been virtually eliminated by enemy action, and with only three remaining soldiers it was impossible to accept the surrender of all six German POWs without compromising his mission: the safe evacuation of Private Ryan from the theater of operations. Had he granted quarter, the three survivors would have at the very least been greatly encumbered in their movements; at worst, the six enemy POWs, along with other German forces known to be concentrated along the planned avenue of evacuation and preparing for counterattack against the Normandy beachhead, might well have overwhelmed their captors[322] and defeated a mission assigned strategic significance by the Army Chief of

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[319] *See supra* note 201 and accompanying text.

[320] *See* R.C.M. 913 (governing presentation of the merits).

[321] *See* R.C.M. 917 (governing motions for a finding of not guilty after presentation of the United States case-in-chief).

[322] Although the United States Theater Provost Marshal was prepared to process, in the first few days after D-Day, as many as 50,000 German POWs in accordance with the requirements of the Geneva Conventions of 1929, Allied military planners were very concerned that once Allied forces extended the beachhead inland the ratio of enemy POWs to capturing Allied troops would threaten not only their capacity to comply with legal obligations but also their physical security. *See generally* AMBROSE, *supra* note 226, at 27-55 (noting that by June 20, 1944, German POWs outnumbered their captors by a ratio of 150:1).

Staff. Upham further testified that in shooting the German POW he had acted consistently with his lawful mission and with standing orders requiring him to evacuate Private Ryan at all costs in the face of an uncertain enemy threat along his planned axis of maneuver. To have accepted the additional encumbrance of POWs and the threat this would have entailed would have been in contravention of his orders as he understood them.[323] Further, Upham testified that he lacked mental responsibility for killing the German POW as a consequence of extreme "battle fatigue"[324] coupled with uncontrollable outrage over the death of his commander at the hand of a perfidious parole violator[325] on whose behalf he had, days earlier, urged his unwilling comrades to grant parole. Finally, Upham testified that he believed it was legally permissible to shoot an enemy POW for parole violation without resort to judicial process, particularly under the circumstances outlined in his earlier testimony.

Following the testimony of T/5 Upham, PFC Reiben and Private Ryan corroborated prior testimony as to their objective and subjective understandings of the enemy threat and of the importance attached to their mission by the General Staff of the United States Army. PFC Reiben testified further that he had not believed it possible to accept the surrender of the German POW due to concerns over the likelihood of imminent contact with a numerically superior enemy force, and that he had believed it necessary to use a moderate degree of force to establish physical control over the POW. He also believed, insofar as he knew and understood applicable law, that Upham had been justified, by necessity and by reference to squad orders, in killing the POW, and he did not believe that he, Upham or Private Ryan had violated any laws in failing to report the circumstances of the death of the POW through the chain of command. Private Ryan reiterated the testimony of PFC Reiben, denying that in the course of his military training he had ever been instructed that failure to report an offense was a violation of Army regulations.

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[323] *See* OSIEL, *supra* note 23, at 128 (stating that fact finders in courts-martial have traditionally undertaken an analysis of defendants' understandings of the lawfulness of their orders and whether such understandings were reasonable under the particular circumstances of each case). Courts-martial have traditionally been instructed to consider whether an accused might reasonably have mistaken his conduct as lawful on the ground that he reasonably believed that he was acting pursuant to the orders of his superior. *Id.* (citing United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973)).

[324] "Battle fatigue" is a historically-dated term for what is now described as post-traumatic stress disorder (PTSD), a mental condition characterized by and caused by shock and trauma. *See* AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 309.81 (4th ed. 1994) (describing PTSD as the development of characteristic symptoms of fear, helplessness, persistent re-experiencing of the event, numbing of general responsiveness and increased arousal "following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing [such] an event). Sustained exposure to combat can induce or exacerbate PTSD and warp the normal moral calculus of soldiers. *See generally* ERIC T. DEAN, JR., SHOOK OVER HELL: POST-TRAUMATIC STRESS, VIETNAM, AND THE CIVIL WAR (1997); Dennis Grant, *Psychological Damage of Combat*, 148 AM. J. PSYCH. 271 (1991).

[325] The defense argued in effect that the violation of parole on the part of the deceased German POW was the proximate cause not only of the death of Captain Miller but of the reaction of T/5 Upham.

After a recess, a series of expert witnesses testified for the defense, beginning with the defense of military necessity. The first two, retired former colonels in the United States Army Judge Advocate General Corps and now law professors, testified that the United States Army Rules of Land Warfare expressly sanctioned the denial of quarter under limited circumstances, including self-preservation and the preservation of the military mission.[326] These experts further testified that, although the denial of quarter was normally a manifestly illegal act not justifiable by military necessity or superior orders, it could, under certain circumstances, be excused where a small unit operating behind enemy lines in a high-threat environment, could not accept prisoners because to do so would necessitate abandoning the mission or disclosing it to the enemy.[327] The third, a former British military lawyer, did not share the opinion that the refusal to grant quarter could be justified; however, he stated that in circumstances such as those faced by the defendants, the denial of quarter was "understandable" and excusable. Although all three experts conceded on cross-examination that an order to withhold from enemy POWs the legal protections afforded by relevant IHL treaties would be an illegal order not entitled to obedience, and that obedience would support the charge of murder,[328] each expert insisted that military necessity had always been available, and continued to be available, as a defense to a charge of murder arising from the denial of quarter in exceptional circumstances,[329] and that to refuse to permit "individuals confronting calamities" to act in the interest of self-preservation would "only succeed in bringing the law [of war] into disrepute."[330]

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[326] *See* RULES OF LAND WARFARE (1940), *supra* note 216, ¶ 85 (providing that a commander may deny quarter on the ground it is necessary in the interest of self-preservation or that caring for enemy POWs interferes with his mission).

[327] *See* 2 WHEATON, *supra* note 237, at 210-11 (stating that military necessity, though often a "fictitious and ubiquitous" claim, excuses the denial of quarter when the likelihood of victory or the rapidity or secrecy of movement would be greatly compromised otherwise); *see also* SPAIGHT, *supra* note 17, at 91 (stating

With respect to the defense of superior orders, defense experts testified that, whether deliberately or indeliberately, illegal orders are frequently issued[331] to subordinates who are nevertheless obligated to comply.[332] They also testified

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that quarter may be denied where the numerical strength of the prospective POWs exceeds the strength of the prospective captors and thus would threaten their safety). Neither of these authors served in the United States Army JAG Corps; however, the substance of their publications is substantially the same as the testimony which experts with practical and academic backgrounds in operational law—the sort of witnesses the defense would call—would have been likely to offer, and thus it is presented as if it were offered by former JAG officers now in legal academia.

[328] BARKER, *supra* note 164, at 27-28.

[329] The jurisprudence of the IMT supported the defense expert testimony that the defense of military necessity was to be counted as among the survivors, rather than the victims, of World War II. *See, e.g.*, *The Flick Case*, *in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 43, at 1187, 1192, 1201, 1206 (1952) (stating that it might be "reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity," a principle with "wide acceptance in American and English courts and . . . recognized elsewhere").

[330] *See* Lippman, *supra* note 52, at 110.

[331] OSIEL, *supra* note 23, at 157.

[332] A defense expert cited the case of General Karl Stenger, a German commander charged with issuing orders directing subordinates to deny quarter and to kill all POWs in their custody but acquitted, despite substantial inculpatory evidence, on the supposition that "no Prussian general officer would have issued

that the United States Army regulations,[333] as well as the Charter of the Nuremberg Tribunal,[334] explicitly provided that even if an order to deny quarter would necessarily be illegal, the very existence of that order was, depending upon the factual circumstances, either a defense or a mitigating factor. These witnesses further testified that soldiers could be lawfully ordered to undertake acts that would otherwise amount to war crimes but for the fact that the purpose of the ordered acts was in reprisal for prior violation(s) of the laws and customs of war by the enemy;[335] that soldiers were duty-bound to execute these orders; and that reprisal against a parole violator could reasonably and in good faith have been considered to be within the scope of the orders issued to the rescue squad to which Upham had been assigned.[336] On the question of the lack of mental responsibility, a psychiatrist testified that combat soldiers are exposed to sleep deprivation, poor nutrition and emotional and physical trauma that con-

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such an order." CLAUDE MULLINS, THE LEIPZIG TRIALS 151 (1921). Although his subordinates were nevertheless convicted of having denied quarter (ostensibly on their own initiative), the charge and the penalties were mitigated by virtue of the suspicion they had been ordered to deny quarter. George G. Battle, *The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 1, 11-14 (1921).

[333] *See* RULES OF LAND WARFARE (1940), *supra* note 216, ¶¶ 345, 347 (providing that United States Army personnel will not be punished for war crimes ordered by their superiors).

[334] *See* Charter of the International Military Tribunal, Aug. 8, 1945, art. 8, 59 Stat. 1548, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter] ("The fact that the Defendant acted pursuant to order of his Government or of a superior . . . may be considered in mitigation of punishment.").

[335] *See* 2 OPPENHEIM, *supra* note 309, at 453.

[336] This precise question was presented in the Dostler Case, during which General Dostler offered the defense of superior orders to the charge of denial of quarter to United States POWs. *See The Dostler Case*, *in* 1 UN. WAR CRIMES COMM'N, *supra* note 224, at 2. The accused contended that Hitler's Kommando-Befehl, ordering the denial of quarter to Allied commandos, was legal inasmuch as it was undertaken in reprisal for Allied denials of quarter and as such left no alternative but to obey. *Id.* at 28. However, the military commission hearing the case convicted the defendant without providing any legal reasoning to support its rejection of the superior orders defense or the argument that the Kommando-Befehl rendered the shooting of the United States POWs a legitimate reprisal. *See generally* KALSHOVEN, *supra* note 28, at 192-301 (discussing the intersection of the superior orders defense with reprisals).

spire to warp normal moral judgments and render the application of formal legal rules by those to whom such experiences are a foreign "morally questionable exercise."[337] According to this witness, where battlefield failure, and even personal destruction, are introduced into this decisional climate, the likelihood that soldiers' conduct will depart from the positive law increases by orders of magnitude[338] in proportion to the intensity of the combat.[339] In his opinion, considering that the defendant had, immediately prior to his execution of the parole violator, witnessed the latter kill his commander, T/5 Upham was suffering from an extreme case of battle fatigue that had destroyed his capacity to judge the moral and legal consequences of his acts.[340] A military historian testified further to the effect that the defense of lack of mental capacity, predicated upon battle fatigue, had long been available to soldiers accused of exacting revenge upon enemy soldiers and units for depredations against their own units.[341]

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[337] Interview with Lieutenant Colonel Mark S. Martins, Deputy Staff Judge Advocate, XVIIIth Corps (Airborne) (Oct. 2, 2000).

[338] The destruction that omnipresent threats to physical survival can wreak upon the moral frame of reference through which soldiers view the world is almost beyond the capacity of those who have not experienced combat to comprehend:

> For the common soldier, at least, war has the feel—the spiritual texture—of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapor sucks you in. You can't tell where you are, or why you're there, and the only certainty is overwhelming ambiguity.

TIM O'BRIEN, THE THINGS THEY CARRIED 88 (1990).

[339] *See* Smidt, *supra* note 40, at 155-59 (correlating the displacement of the moral compass of soldiers off its normal bearing with the increase in combat intensity and associated spike in destruction and death).

[340] *See* Everett, *supra* note 283, at 1429 (outlining, from the point of view of a JAG lawyer and a military judge, the standard arguments in support of a defense of lack of mental capacity to a charge of a war crime).

[341] The phenomenon whereby soldiers are unable to restrain themselves from exacting revenge after capturing enemy forces have killed their comrades is well-documented, and although the defense of lack of mental responsibility resulting from the emotional trauma of such circumstances has not uniformly led to the acquittal of soldiers charged with denial of quarter, it has been treated by courts-martial as an admissible defense and as an extenuating and mitigating factor.

Defense counsel then introduced several Army publications in support of the defense of ignorance, claiming that, although ignorance of the law does not justify its violation as a general rule, the government recognized as a matter of official policy that IHL "does not in some cases possess either the exactness or the degree of publicity which pertains to municipal law,"[342] thereby affording the ignorant violator a defense. A series of retired members of the Judge Advocate General corps and professors of military law testified that knowledge of IHL, an increasingly complex regime, could not be presupposed even in officers, let alone enlisted soldiers, by virtue of the uneven and incomplete distribution of such knowledge in the training provided by the Army[343] as well as the capacity

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See generally Kershen, *supra* note 193 (discussing the admission and adjudication of the defense of a lack of mental responsibility in the 1900 court-martial of British soldiers for denial of quarter to Boer POWs and suggesting that the pre-capture conduct of POWs would normally have been considered as extenuating and mitigating circumstances). Even more frequently, under such circumstances the denial of quarter to enemy POWs has been treated as a forgivable, and even understandable, reaction to extreme provocation not subject to referral to the military criminal justice system. The following exchange, conducted between a senior noncommissioned officer and the author, an officer in the British Army, following the execution of German POWs by British soldier, "S—", subsequent to the storming of a German trench in World War I, is representative of this oft-repeated practice:

> 'What the hell ought I to do?'
>
> . . .
>
> 'I don't see that you can do anything,' I answered slowly. 'What can you do? Besides I don't see that S—'s really to blame. He must have been half mad with excitement by the time he got into that trench. I don't suppose he ever thought what he was doing. If you start a man killing, you can't turn him off like an engine. After all, he is a good man. He was probably half off his head.'
>
> 'It wasn't only him. Another did exactly the same thing.'
>
> 'Anyhow, it's too late to do anything now. I suppose you ought to have shot both on the spot. The best thing now is to forget it.'"

GUY CHAPMAN, A PASSIONATE PRODIGIALITY: FRAGMENTS OF AUTOBIOGRAPHY 115-16 (1933).

[342] U.S. DEP'T OF ARMY, II INTERNATIONAL LAW, DAP 27-161-2, at 246 (1962) [hereinafter DAP 27-161-2].

[343] *See* WELLS, *supra* note 12, at 120-21; OSIEL, *supra* note 23, at 126 (noting that in the court-martial of Lieutenant Calley for the unlawful killing of noncombatants in My Lai during the Vietnam War, the defense of "following superior orders unreasonably believed to be lawful" was reinforced by evidence that Calley

of soldiers to absorb such complex material in the context of other training obligations.[344] These experts concluded that it was reasonable for Upham to have relied on his superiors and to have believed that such orders were legal even if he had been mistaken.[345] Finally, the defense introduced as character witnesses[346] members of the 101st Airborne Division whose lives Private Ryan had saved in combat on the night of June 5, 1944 resulting in his award of the Silver Star;[347] the defense also entered into evidence copies of the citations issued to Private Ryan and PFC Reiben upon their respective awards of Bronze Stars[348] for heroism in combat in Italy in early 1944. After the defense concluded its case-in-chief, the

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had been inadequately trained in IHL, leading to a reduction in the charges against him) (referring to United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (C.M.A. 1973), *petition for writ of habeas corpus granted sub nom.* Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); Christine Van Den Wyngaert, *The Suppression of War Crimes Under Additional Protocol I*, *in* HUMANITARIAN LAW OF ARMED CONFLICT, *supra* note 12, at 200-01 (indicating that confusion and ignorance with respect to IHL remained endemic within the armed forces of many states as late as the 1990s due to inadequate military education programs).

[344] *See* Dov Shefi, *The Status of the Legal Adviser to the Armed Forces: His Functions and Powers*, 100 MIL. L. REV. 119, 119-20 (1983) (stating that the "prolific development" and "great complexity" of IHL requires significant study, guidance and expertise in the translation to the battlefield where faculties are dedicated to the defeat of the enemy, leaving little additional capacity to parse the meaning of the commandments of an unclear legal regime).

[345] *See* OSIEL, *supra* note 23, at 356 (elaborating the "reasonable error" approach to the defense of superior orders where the analysis centers upon whether a defendant's mistaken belief in the legality of his orders was reasonable under the circumstances).

[346] At courts-martial, evidence supporting the inference of the good character of the accused consists primarily of citations for heroism in combat as well as the testimony of witnesses whose lives the accused has saved. Everett, *supra* note 282, at 1432-33.

[347] The Silver Star—the third-highest decoration for military valor awarded by the United States—is awarded to a person "who . . . is cited for gallantry in action . . . while engaged in an action against an enemy of the United States" but where the circumstances do not justify the award of the Distinguished Service Cross. 32 C.F.R. § 578.7 (2000).

[348] The Bronze Star is a decoration for military valor awarded for "heroic or meritorious achievement or service . . . while engaged in an action against an enemy of the United States." Exec. Order No. 11046, 32 C.F.R. § 578.11 (2000).

court adjourned.

The next morning the judge, acting sua sponte, issued a finding of "not guilty" as to PFC Reiben and Private Ryan[349] and ordered their release from custody. The prosecution proceeded to its closing argument as to the remaining defendant, T/5 Upham.[350] The prosecutor described the denial of quarter to the German POW as an act of premeditated murder that was no less criminal, under domestic and international law,[351] by virtue of the despicable status of the victim as a parole violator in the armed forces of a state at war with the United States. The prosecutor then recapitulated the arguments that none of the defenses were applicable, either as a matter of law or in the factual circumstances presented, on the grounds that Upham knew that the denial of quarter was categorically illegal or at least illegal in circumstances wherein he had the option to use nonlethal means to reduce the threat to the squad and the mission, and that notwithstanding the stressors of combat Upham possessed the requisite mental capacity to freely choose actions that he knew were illegal. In conclusion the prosecution described Upham as having engaged in an illegal reprisal "dressed up as military necessity"[352] against an enemy soldier, for whom he held personal animus, the effects of which were to bring grievous harm and disrepute upon, as well as compromise the good order and discipline of the United States Army. The prosecution thus requested that the panel find Upham guilty of murder in violation of Article 118 of the UCMJ.

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[349] R.C.M. 917 provides that the court, acting sua sponte, "shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected.").

[350] R.C.M. 919 (providing procedures for closing arguments and rebuttal by the government).

[351] The prosecutor stated that duties of combatants, whether United States or foreign, included those obligations imposed by applicable treaties limiting conduct in war, and that, because Congress had ratified such treaties and consented to their incorporation in domestic law, to the extent domestic and international law were in disharmony (which disharmony the prosecutor did not recognize in the instant case), the international obligations governed. For arguments that IHL is a peremptory regime that trumps inconsistent domestic law, see Lippmann, *supra* note 52, at 110.

[352] Although the martial code admits and concedes terrain to military necessity, it does not categorically justify all acts, including manifestly unlawful acts alleged to have been undertaken in light of necessity; rather, the martial code immunizes legitimate acts essential to self-preservation and to the accomplishment of a mission but rejects the necessity defense in cases where other options were available and would have been chosen by honorable soldiers. *See* TAYLOR, *supra*

The defense then began its closing argument by restating that T/5 Upham acted pursuant to lawful orders issued by the Chief of Staff of the United States Army transmitted to him through his commanding officer, Captain Miller, requiring him to safely evacuate Private Ryan from a position deep behind enemy lines during the height of a German counterattack. In this threat posture, obedience to these orders, particularly after the Battle of Ramelle further attrited the rescue squad, required him, as senior enlisted soldier in command, to deny quarter to an enemy soldier who had previously demonstrated his perfidy by violating his parole. The defense insisted that the laws and customs of war permitted an exception to the general presumption in favor of quarter in circumstances where an understrength unit was physically unable to take prisoners and the would-be prisoner in question—a parole violator—was the permissible object of reprisal. In any event, the defense also insisted that Upham was so overcome by the stressors of combat that even had he been instructed in the course of his military training that his spontaneous decision to kill the German POW was legally impermissible, which he had not, he would have been unable, as a result of a lack of mental capacity, to refrain from so doing. In effect, the defense propounded a standard for the panel in determining the guilt of the defendant which would require the panel to enter a finding of not guilty unless the panel could clearly conclude that the defendant knew his actions to be illegal and intended to violate a legal obligation.[353] Finally, the defense encour-

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note 13, at 34-36.

[353] Some commentators suggest that legal culpability in courts-martial should be restricted to those circumstances where an accused knew his actions to be illegal. *See* Wasserstrom, *supra* note 28, at 66 (noting advocacy in favor of this more stringent standard of proof based upon actual knowledge of illegality and intent to commit an illegal act).

aged the panel to

> look past the dusty books written by old lawyers who never smelled a whiff of cordite, never seen gouts of blood gushing from the shattered hulk of a buddy, never had to decide whether to protect their buddies and lose their innocence or keep their innocence and lose their buddies. Look past murky rules that make sense only from the safety and comfort of Washington and seem as bizarre moralistic posturings to the brave but terrified American boys locked in an existential struggle against an evil regime that every day violates more rules of war than the eminent experts testifying before this court could ever hope to identify and record and catalogue. This is a normal man under abnormal circumstances made all the more aberrant by the perfidy and treachery of the deceased, a willing and eager exponent of a criminal government, and he did nothing more than protect himself and accomplish his mission as ordered by the Chief of Staff of this United States Army. There is a ocean of difference between peace and war, between those who went to war and those who have stayed behind, between the murderous criminals who run the government that declared war upon our nation and this bewildered young man sitting before you. Does deliberately killing an enemy soldier who has proven his untrustworthiness constitute a war crime? If it is, then how do you justify the carpet-bombing of Hamburg and Tokyo and the deliberate roasting to death of women and children in the name of breaking the enemy's will to fight? One of the greatest ironies of human history is the fact that if you kill one hundred thousand civilians with bombs dropped from an airplane you're a hero, whereas if you shoot one enemy soldier for perfidy you get a seat in the docket at court-martial with a firing squad looming in the wings. Do not erect an insurmountable double-standard for those struggling to survive in a world gone mad. Do not profane the very ideals and principles you exalt by punishing this man unless you yourselves would wish to bear the burdens of your own judgment and unless you can proclaim precisely how, during that frightful fortnight, you would have managed to retain your life and your sanity while faithfully discharging your duty would it have been you, rather than he, who your government tapped to hold that no-man's land between the civilization the so-called laws and customs of war have been instituted to defend

> and the relentless advance of modern-day barbarians for whom any imperative, save for the urge to conquest, death, and destruction, is but a nuisance to be circumvented by deception and force.[354]

With this, the defense rested, and on rebuttal the prosecutor urged the panel not to permit a "code of complicity between brothers-in-arms" or the "natural sympathies for those fighting in a noble cause" to prevent the administration of justice in accordance with law.[355] Following this the court adjourned.

The following morning, after reviewing proposed jury instructions submitted by the parties,[356] the judge provided the members of the panel with a detailed statement of the law with respect to the elements that constituted the charge of "Murder," Article 118 of the UCMJ, along with the lesser-included offenses[357] of Article 119, Manslaughter.[358] The instructions also contained a description of proffered defenses, as well as a detailed statement of the law with respect to military necessity, the extent of any duty to obey illegal orders, the effect of mental capacity on legal responsibility for one's actions and the effect of ignorance of the law. The judge then charged them with answering a series of questions to ascertain the guilt or innocence of the accused, including (1) whether the denial of quarter to an enemy POW was categorically illegal as a matter of United States law (if so, they were to return a finding of guilty); (2) whether the defendant's orders expressly ordered the denial of quarter or could reasonably have been construed to authorize denial of quarter; (3) if the answer to (1) was negative, whether under the circumstances of the case the defendant had any available defenses to the charge of murder; and (4) if the answer to (3) was affirmative, whether one or more of these defenses constituted a complete or partial defense or a factor in mitigation. The judge then expressly advised the members of the panel that, if they reached Question (4), they were permitted to consider any environing circumstances supported by the evidence[359] in determining whether an ordinary soldier in the position of the defendant could have (a) reasonably mistaken the circumstances under which he shot the German POW to be such that it was militarily necessary to deny quarter to preserve his own life, the lives of his fellow soldiers or the success of the mission; (b) reasonably understood himself to be acting pursuant to a reasonable interpretation of superior orders[360] that were not manifestly illegal;[361] (c) reasonably been unaware that his actions were illegal; or (d) been unable to understand the illegality of his actions due to a lack of mental responsibility.[362] The judge then instructed the panel to consider the extent to which the defendant departed from the standard practice of the United States Army in the European Theater of Operations as he had witnessed that practice.[363] Finally, the judge instructed members of the panel that a two-thirds majority was required to reach a finding of guilty.[364]

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[354] The defense summation is loosely patterned after that offered by Major J.F. Thomas, counsel for Lieutenant "Breaker" Morant, at his court-martial before a British panel in 1900, as well as an editorial from former United States Navy Secretary James Webb castigating the absolutism of NGOs that sought to prosecute United States soldiers for alleged violations of IHL during the Korean War. *See* Kershen, *supra* note 193, at 115 (discussing the Morant court-martial); James Webb, *The Bridge at No Gun Ri*, WALL ST.J., Oct. 6, 1999, at A22 (arguing against absolutism and in favor of the martial code in the post hoc review of the legitimacy of actions undertaken by soldiers in combat).

[355] *See* Lippmann, *supra* note 52, at 111 (stating that a "code of complicity among armed comrades complicate[s] the reconstruction of events and the apprehension and prosecution of offenders" at courts-martial).

[356] R.C.M. 920(c).

[357] R.C.M. 920(e).

[358] *See* 10 U.S.C. § 919 (1998) (criminalizing the unlawful killing of a human being "in the heat of sudden passion caused by adequate provocation" with the intent to kill).

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[359] The "infinitely varied circumstances and conditions of combat never produce exactly the same situation twice," and as "terrain, weather, dispositions, armament, morale, supply, and comparative strength are variables whose mutations always combine to form new patterns of physical encounter." Richard D. Hooker, Jr., *The Mythology Surrounding Maneuver Warfare*, 23 PARAMETERS 27, 30 (1993). Consequently, the judge at court-martial instructs the panel to treat each case arising out of a hostile engagement as an event *sui generis* whose facts are to be ascertained, assessed and adjudicated not by reference to some artificial template but on its own merits.

[360] In connection with the determination of the defendant's interpretation of his orders, the judge instructed the panel to determine what standard of lawfulness the defendant had been trained to apply in the course of his military education. *See* TAYLOR, *supra* note 13, at 159-60 (describing standard court-martial instructions to the panel on the issue of the lawfulness of orders).

[361] The "manifest illegality" standard creates an irrebuttable presumption that a defendant executing a manifestly illegal order possesses the requisite knowledge of the criminal character of the order and, as such, is guilty of the underlying act as a matter of law. Lippmann, *supra* note 52, at 55.

[362] Following the conclusion of the evidence, the judge gives the panel detailed jury instructions as to the elements of the crime(s) specified and other matters of law, including the elements of and availability of affirmative defenses and the

The members of the panel retired to deliberate in closed session,[365] and the senior member, a colonel under General Eisenhower, initiated deliberations[366] by suggesting that the duty of the panel was solely to determine whether the government had established that the killing of the German POW was unlawful,[367] as the question of whether the defendant had committed the act had already been definitively resolved by stipulation. Without dissent, the panel, by informal voice vote,[368] swiftly and unanimously answered Question (1) in the negative, concluding that, on the basis of evidence as to applicable law and as to the actual practice of soldiers in battle,

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presumption of innocence. Everett, *supra* note 282, at 1426. Moreover, in charging a jury, the court frequently provides express instructions to consider "a host of environing circumstances," and, in so doing, to attempt to assume the perspective of the "ordinary soldier." OSIEL, *supra* note 23, at 128. Although the "ordinary soldier" standard would appear to be an objective measure, in practice it is "calibrated to the defendant's background, rank and circumstance, thus taking into account the typical conscript's level of understanding and the conflicting pressures placed upon him," and far more is demanded of an officer than of an enlisted soldier in assessing the reasonableness of a defendant's subjective interpretations of the law relevant to the acts and omissions giving rise to the charge(s) against him. Lippmann, *supra* note 52, at 54.

[363] The defenses in court-martial are essentially equitable rather than legal in nature, and to ensure that a specific act that is conduct either authorized or encouraged by higher elements in the chain of command is not treated as a criminal act it is necessary, in the interests of justice, to view that act against the backdrop of the prevailing practices of the Army. *See* TAYLOR, *supra* note 13, at 155-56.

[364] *See* 10 U.S.C. § 852(a)(2) (requiring a two-thirds majority for a guilty finding).

[365] *See* R.C.M. 921 (providing for secret deliberation on findings).

[366] Rank is immaterial in the deliberations of the court-martial panel. *See* R.C.M. 921(a).

[367] 10 U.S.C. § 918 (requiring, to establish the crime of murder, that the killing be proven "unlawful").

[368] Voting as to innocence or guilt is conducted by secret written ballot, although votes on other questions may be held by whatever means the members elect. *See* R.C.M. 921(c).

denial of quarter to an enemy POW was not categorically illegal.[369] On Question (2), the members unanimously concluded that the orders issued by the Chief of Staff and transmitted down the chain of command did not expressly obligate Upham to deny quarter. However, although the three officers, only one of whom had experienced combat, disdainfully rejected the defense argument that the orders in question were susceptible of an interpretation authorizing the killing of Germans attempting surrender, the two enlisted members, both of whom came ashore on Omaha Beach with the 1st Battalion of the 116th Infantry Regiment and were lightly wounded in subsequent combat, insisted that an order from the command apex of the United States Army to evacuate a private soldier was so remarkable that ordinary measures of force protection could not apply and the denial of quarter could have been constructively authorized. Moreover, the enlisted members pronounced that they themselves might have interpreted the orders in this fashion and, to the consternation of two of the officers, offered anecdotal evidence from their combat experience that enlisted soldiers neither granted nor expected quarter in circumstances such as those faced by T/5 Upham—executing orders to complete a mission of national importance with severely attritted forces in a fluid threat environment characterized by overwhelming enemy strength and enemy perfidy along the planned axis of maneuver.[370] Although the enlisted members did not sway the officers, only three of the five members found against the defense on the question of whether an interpretation of the defendant's orders to authorize denial of quarter was reasonable under the circumstances.

In regard to Question (3), the panel began with the defense of military necessity, which fared the same as the defense of superior orders and was treated by the two enlisted members as closely intertwined. The two enlisted soldiers reiterated their argument that even if the post hoc review of others might reach a different conclusion, military necessity might have justified the killing of the German POW from the perspective of the defendant, who could not have been certain, given the heavy attrition his squad had suffered and the concentration of enemy forces preparing to counterattack against the Allied salient, that he could successfully evacuate Private Ryan encumbered by an enemy POW whose perfidy had already been established by the violation of his parole and the bearing of arms against his former captors. Although heated criticism of this argument, centered upon the contention that the defendant could have simply released the German POW without appreciably increasing the threat profile or further compromising the mission and without committing a putative violation of law, failed to budge the agitated junior members of the panel, to whom this argument was the "the sort of wishful armchair officer's thinking that winds up getting men killed"; it had the reverse effect with respect to a lieutenant whose injuries sustained during training in England in early 1944 had resulted in his reassignment from the 82nd Airborne Division to a pending assignment as an airborne instructor in the United States. By the end of a lengthy debate over the precise meaning of military necessity, the enlisted members of the panel were prepared to accept the defense of necessity and move directly to acquit the defendant, while the lieutenant was undecided. With tempers flaring, the sergeant-at-arms excused them for the day.

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[369] The members of the panel in the case of *United States v. Private Ryan* did not have the benefit of the jurisprudence emanating from the Nuremberg and Tokyo tribunals in reaching their findings. *See supra* notes 360, 363 and accompanying text.

[370] *See supra* notes 140, 222, 225-29, 232 and accompanying text (chronicling such incidents in military history of World War II).

In the calmer atmosphere of the next morning, the panel pressed on to the consideration of the remaining defenses. All members immediately rejected the defense of a lack of mental responsibility, with the enlisted soldiers expressing particular indignation that the defendant would have permitted his counsel to employ the argument that he had not been in possession of his faculties. "First he says he knew what he was doing and why, that he had to complete the mission, and now he says he was out of his mind over his captain," fumed one of the enlisted soldiers. "Don't blame him, it's the lawyer," the other reminded him. On the defense of ignorance, all but one of the panel concluded that the defendant had not known that the denial of quarter was arguably an illegal act and that the military training he received had not instructed him otherwise. "Might be a good idea to add another week to basic training," opined the lieutenant, to shrugs from the others. The sole member who rejected the ignorance defense, a major of infantry and a veteran of the World War I Battles of St. Mihiel and Cantigny, did so on the ground that he believed that the defendant had in fact known the status of the law, including, in his estimation, the fact that the law permitted reprisals in the field against a parole violator. "When you catch one in arms after he granted his parole, you shoot him. That's something every soldier knows. Last time I checked it's the first rule in the law book, Rule M1," the major said, to grim smiles from the enlisted soldiers.[371] "It ain't like the Nazis," one of the enlisted soldiers added. "He didn't kill him in cold blood. He gave a war criminal what he had coming. Any of us would've done the same thing. That's war."[372] In other words, T/5 Upham had acted lawfully, and now three members were prepared to acquit the defendant of murder.

In recognition of the vector along which deliberations were traveling, the colonel suggested that a finding of guilty on the specification of Murder was impossible and that, because none of the defenses proffered had been ruled complete defenses, the panel should consider the lesser-included offense of Manslaughter as well as the cumulative effect of various defenses and any extenuating or mitigating circumstances. An enlisted soldier countered with the possibility of considering Assault with Intent to Commit Voluntary Manslaughter,[373] but because this offense had not been specified, the judge instructed that this was not within their jurisdiction. The panel deliberated for hours without progress; the enlisted soldiers and the lieutenant were committed to the defense of necessity, the colonel strongly favored conviction and the major was inscrutable.[374]

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[371] The M1 Garand Rifle was the primary personal weapon carried by United States soldiers in the European Theater of Operations in 1944. Reference to "Rule M1" is a sardonic acknowledgement that the most important principles and customs governing war are those that are practiced on the battlefield, that soldiers are expected to kill enemy soldiers with their M1 rifles, and that no positive legal regime can regulate soldiers' conduct unless it is compatible with the custom of reprisal, which continues to hold a most prominent place in the martial code.

[372] Adjudication of individual criminal responsibility on the part of commanders who issue orders to others to commit war crimes, or on the part of those who commit such crimes after a long opportunity for repose, is arguably a less morally and legally complicated exercise than is the determination of the liability of those who, on their own initiative, act in the heat of battle while under threat from their enemies. *See* BARKER, *supra* note 164, at 27-28 (stating that it was less difficult at the post-World War tribunals to attribute criminal liability for war crimes to "decision-makers far from the scene of the action" than to prove the liability of "those who carry out the orders").

Late that afternoon, the panel voted by show of hands as to the guilt or innocence of T/5 Upham. Only one—the colonel—voted to convict on the charge of Manslaughter, and following the vote, the colonel posed this question to the other members: "Do we really want the defendant to walk away from this with nothing? Can we really say that Upham was not morally culpable at all? Even though that Nazi was a dishonorable son-of-a-bitch, is what Upham did the way we as soldiers are supposed to behave?"[375] The four other members of the panel pondered for a long moment, and one-by-one shook their heads save for one of the enlisted men. "I reckon not," the other enlisted soldier said. "If he had really wanted to he could have had one of the other POWs tie that German up, or better yet had them all tie each other up. But he had a score to settle. Not too sure I blame him, though . . . " he said, trailing off into thought.[376]

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[373] *See* 10 U.S.C. § 934 (punishing "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces").

[374] This intense internal debate, rather than frustrate administration of military justice, is essential to the determination of the requirements of martial honor as applied to the specific case before a jury of military peers and is protective of the rights of the accused as well as the integrity of the profession of arms. OSIEL, *supra* note 23, at 285 (describing process whereby military professionals debate and resolve standards of virtue crucial to the functioning of the martial code).

[375] The fundamental question of liability in courts-martial can only be resolved by a determination of whether the accused was morally culpable, within the framework of reference of honorable soldiers, of any wrongdoing; the "arcane and logically irresolvable "questions" of whether particular descriptions of the accused's conduct violated various textual and customary prescriptions and proscriptions, though of great interest to IHL lawyers, are far less relevant. OSIEL, *supra* note 23, at 356.

[376] As one military scholar notes, even the most honorable soldiers may find

The colonel then proposed that the panel convict T/5 Upham of Manslaughter but take into consideration extensive factors in mitigation of the sentence,[377] reminding them that they had authority to pronounce any sentence they should choose.[378] The panel deliberated for another three hours and then, late in the afternoon, returned to the courtroom to announce its findings.[379] On the charge of Manslaughter, Article 119 of the UCMJ, the panel convicted T/5 Upham by a vote of four-to-one. In the sentencing hearing, which followed immediately, the prosecution admitted that T/5 Upham had no prior convictions and that there was significant rehabilitative potential but argued that the deliberate nature of the offense should be considered as an aggravating factor[380] and that the maximum sentence of fifteen years' confinement, along with a forfeiture of benefits and a dishonorable discharge, was appropri-

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that, subject to the stress and exigencies of combat, there is simply no time to ask, 'What kind of person do I want to be, and what would such a person do?'" Reed R. Bonadonna, *Above and Beyond: Marines and Virtue Ethics*, *in* MILITARY LEADERSHIP (Robert L. Taylor & William E. Rosenbach eds., 1996).

[377] *See* 10 U.S.C. § 852 (providing that the members of a court-martial also determine the sentence and may take into consideration factors in mitigation, aggravation and extenuation).

[378] In some senses, the power of the jury in courts-martial to pronounce a very lenient sentence amounts to a form of quasi-nullification in cases where equity demands its application. Perhaps the most (in)famous example occurred during World War II, when a black Army officer, charged with physical violence for allegedly pushing an officer attempting to prevent him from entering an officer's club designated for whites only, was, although convicted of the charge, sentenced by a court-martial jury to pay a $150 fine despite being eligible for the death penalty. *See* James Allison, *Mutiny at Freeman Field: The Life and the Art of James Gould Cozzens*, 92 BLACK HIST. NEWS & NOTES (May 2003) (discussing jury nullification in the court-martial of 2LT Roger C. Terry in 1945). Jury nullification occurs with respect to even the most serious of crimes. In the court-martial of Lieutenant Duffy for ordering the murder of an unarmed Vietnamese POW in 1969, the jury, after hearing testimony that other officers had been given orders to deny quarter but nonetheless convicting Duffy of murder, amended the first two findings to find Duffy guilty of conspiring to commit involuntary manslaughter and sentenced him to confinement for six months and forfeiture of $250 per month for six months. United States v. Duffy, 47 C.M.R. 658, 660-62.

[379] *See* R .C.M. 922 (proving that findings are announced promptly in the presence of all parties).

[380] *See* R.C.M. Rule 1001 (providing procedures for adversarial hearing on sentencing and the introduction of evidence as to general character, rehabilitative potential and evidence in aggravation as well as mitigation and extenuation).

ate.[381] The defense introduced evidence that Upham, only nineteen years old, had been an exemplary civilian and soldier who had volunteered at age seventeen rather than wait to be drafted, and whose services, including his native fluency in German and French, were very much in need. The defense contended that the likelihood of a repetition of the offense was minimal as Upham would not likely be assigned again to a combat unit (his duties had theretofore been largely in support of Army intelligence at brigade echelon), and he now knew that execution of a parole violator was contrary to law. The defense argued further that Upham could best be rehabilitated, and the interest of the United States would best be served, were he to remain subject to Army jurisdiction. The defense proposed, in lieu of confinement, a sentence of forfeiture of pay and benefits, reduction in rank to E-1 and a bad conduct discharge[382] subsequent to the termination of the war against Germany. This proposal was supported with precedential evidence suggesting that, in addition to their already broad equitable powers, courts-martial have great discretion to pronounce lenient sentences, such as admonishment[383] and other disciplinary punishments,[384] upon a conviction of denial of quarter during a struggle with a savage foe.

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[381] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 44.e.(1) (2000 ed.) (providing for a maximum penalty of fifteen years confinement, dishonorable discharge, and forfeiture of pay and benefits upon conviction of manslaughter).

[382] Punitive discharge, forfeiture of pay and benefits, reduction in rank and formal admonishment are distinctively non-penal military punishments for which the Manual for Courts-Martial makes specific provision. *See id.*, app. 12. The use of non-penal sanctions, even with respect to the punishment of serious crimes, is not unique to domestic law or to the system of courts-martial. In post-civil war Bosnia, where domestic prosecutions are difficult to conduct due to evidentiary, political, logistical and financial difficulties, the U.N. mission has recently begun, with some success, to introduce non-penal sanctions to reach the conduct of thousands of culpable individuals who remain in official positions in public life despite having committed prosecutable crimes, including genocide, war crimes and crimes against humanity. *See* Gregory L. Naarden, *Nonprosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnian Police Officials*, 97 AM. J. INT'L L. 342-52 (2003) (discussing the regime of non-penal sanctions administered by the U.N. in Bosnia).

[383] *See, e.g.*, Court-Martial of General Jacob H. Smith, *supra* note 315, at 17 (sentencing Smith to be "admonished by the reviewing authority" for having issued orders to subordinates directing denial of quarter to enemy guerrillas).

[384] SHELDON GLUECK, WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT

Following arguments as to sentencing, the judge instructed the panel that the maximum sentence for manslaughter was fifteen years confinement and instructed the members on procedures for voting,[385] at which time the panel retired to deliberate. Three hours later the panel returned and the colonel, as president of the court-martial, pronounced the sentence:[386] one year confinement, forfeiture of six months' pay, reduction in rank to E-1 and a general discharge with the one year confinement suspended[387] and the remainder of the sentence deferred until the end of the war against Germany.[388] A petition for clemency signed by four of the five jurors accompanied the sentence,[389] and the court-martial adjourned.[390]

The next morning the Staff Judge Advocate (SJA) assigned to the 75th Ranger Regiment to assist Major General Gerhardt in determining whether and how to exercise his command prerogative,[391] reported his recommendation that the sentence be executed as pronounced. However, rather than do so, General Gerhardt, who had argued vehemently against the courts-martial of Private Ryan and others only to be overruled by General Eisenhower, transmitted the trial record to the Judge Advocate General of the Army with an expression of his views[392] that

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31-32 (1944).

[385] *See* R.C.M. 1005.

[386] *See* R.C.M. 1007.

[387] *See* R.C.M. 1108.

[388] *See* R.C.M. 1101 (providing for deferment of sentence by the convening authority or officer with jurisdiction).

[389] *See* R.C.M. 1106(d)(3)(B).

[390] *See* R.C.M. 1011.

[391] *See* R.C.M. 1106 (providing for assistance of legal counsel to convening authority in determining a course of action with respect to the sentence of court-martial). The role of the SJA is to evaluate the sufficiency of the evidence and make recommendations for action in light of the service record of the accused and other relevant considerations. *Id.* Although the convening authority normally accepts the SJA recommendation, it has "absolute power to disapprove the findings and sentence, or any part thereof, for any reason or no reason," and thus the SJA role is simply advisory. *See* U.S. DEP'T OF ARMY, *supra* note 288, at 58.

[392] *See* U.S. DEP'T OF ARMY, *supra* note 288, at 58 ("In those unusual cases in which a convening authority is in disagreement with his [SJA] or legal officer as to the effect of any error or irregularity respecting the proceedings, as to the adequacy of the evidence, or as to what sentence can legally be approved, the

"the killing of the German POW without judicial process was a regrettable, but momentary, lapse in the maintenance of the discipline and honor that distinguish our Armed Forces from those of our enemies," and after further reflection he "could not clearly conclude that T/5 Upham had committed any offense under the military regulations as they are commonly understood by the enlisted soldier," and the execution of the sentence "would not serve the interests of justice but would rather, if widely publicized, be detrimental to the morale and fighting spirit of the troops under my command who are even now preparing for an invasion of Germany that will require the maximum devotion from every available soldier if victory is to be ours." In short order, the Judge Advocate General of the Army relayed his opinion in which the Chief of Staff writing under separate cover concurred, that in light of further review, General Gerhardt had articulated an adequate basis for disapproving the sentence of the court-martial[393] as well as ordering a rehearing[394] or a dismissal of the charge.[395] With the major offensive against Germany already underway, and with an immediate rehearing thus impracticable[396] if Upham was to be returned to service, General Gerhardt elected to dismiss the charge against T/5 Upham and immediately ordered his transfer to the headquarters of the 3d Army, soon to be commanded by Lieutenant General George S. Patton.

On December 26th, during the Battle of the Bulge, T/5 Upham was killed in combat in the town of Bastogne, Belgium. Six months later Germany surrendered unconditionally to the

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convening authority may transmit the record of trial, with an expression of his own views and the opinion of his . . . legal officer, to the Judge Advocate General of the armed force concerned for advice.").

[393] *See* R.C.M. 1107(d)(1) ("The convening authority may for any or no reason disapprove a legal sentence . . . , and change a punishment . . . as long as the severity of the punishment is not increased.").

[394] *See* R.C.M. 1107(e)(1) (providing for rehearing as to charged offenses or sentence at discretion of the convening authority).

[395] *See* R.C.M. 1107(c)(2)(A) (allowing convening authority to set aside a guilty finding and dismiss a charge).

[396] *See* R.C.M. 1107(e)(1)(B)(iii) (stating that "If the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.").

Allies.

It is not surprising that a court-martial convened to try Private Ryan and others in 1944 could not adjudge the killing of a parole violator to disencumber a unit engaged in a mission of strategic importance during a counterattack by a numerically superior foe to be the sort of dishonorable and egregious violation of the martial code disentitling a soldier to continued membership in the martial caste. The putative victim had not conducted himself as a honorable soldier and thus could not claim all the privileges and immunities attendant to that status, and the treatment meted out by T/5 Upham was precisely that which the martial code would have prescribed, albeit after judicial determination of guilt, had Upham accepted his surrender. Moreover, the claims of military necessity and ignorance of the law struck a chord with those members of the jury to whom, as enlisted infantry soldiers, the vicissitudes of combat and the extraordinary requirements of survival in battle were not alien but for whom scienter of the "black letter" of IHL—a body of regulations so uncertain that even experts disagree as to its precise commandments—was, through no omission or fault of their own, glaringly absent. While Upham might not have exhibited that degree of professionalism, temperance and martial virtue demanded by his peers, neither did he entirely excommunicate himself from their fellowship by executing a dishonorable member of the armed forces of an atavistic regime dedicated to the destruction of the civilization the defense of which, on the afternoon in question, was his duty. In short, the jury, in consideration of all the circumstances, including conflicting expert statements as to the rules of IHL, issued a judgment that reproached and disciplined Upham for his true crime—falling short of a professional ideal that demands of soldiers that they accept significant additional personal risks before they deny quarter to even the most reprehensible POWs—without inflicting inordinate punishment disproportionate to the offense, without conceding any absolute obligation to grant quarter and without branding Upham as beyond the pale of the martial code and thus unfit for duty. With the spectre of Nazism looming large as a backdrop, the seriousness of the delict in question assumed its proper proportion, meriting disciplinary rather than penal sanction.

b) United States v. Private Ryan, 2003

The drive to humanize war gained impetus from World War II and the Geneva Conventions of 1949 (GCs),[397] which consisted of four multilateral treaties that updated and enlarged the IHL regime and imposed upon parties[398] the obligation to pass domestic legislation criminalizing "grave breaches"[399] of their provisions. Denial of quarter and reprisal are specifically and categorically prohibited as grave breaches;[400] the Geneva Conventions, on their face, appear to obligate parties to render inapplicable any defenses, such as military necessity or superior orders, to domestic prosecutions of individuals accused of the denial of quarter and of reprisal[401] as well as to investigate, prosecute and punish all violations

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[397] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter GCIII]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV] (increasing categories of persons entitled to POW status, improving treatment of POWs, improving post-conflict repatriation procedures, and codifying a specific set of war crimes, known as "grave breaches"). These Conventions are known collectively as the "Geneva Conventions."

[398] The Geneva Conventions have been ratified by almost all States and can thus be considered binding not only upon parties but upon non-parties as customary IHL. *See* Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14, 114 (June 27) (holding that common Article 1 of the Geneva Conventions is declaratory of customary IHL); Meron, *Humanization*, *supra* note 12, at 252 (stating that Common Article 6/6/6/7 of the Geneva Conventions, providing that parties may conclude bilateral agreements conferring protection upon individuals greater than that afforded in the Geneva Conventions, has attained the status of a quasi-norm of *jus cogens* and is evidence of customary IHL); Int'l Comm. of the Red Cross, Commentary on the Geneva Conventions Aug. 12, 1949, at 368 (Jean S. Pictet ed., 1952) [hereinafter ICRC Commentary] (suggesting that Common Article 3 is declaratory of a customary international obligation to suppress all breaches of the Geneva Conventions); Howard S. Levie, *Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War*, 7 U.S.A.F.A. J. LEG. STUD. 37, 38 (1996-1997) (arguing more broadly that the substantive provisions of the Geneva Conventions are enforceable against non-parties as customary IHL).

[399] Although any violation of the Geneva Conventions might theoretically be categorized or described as a "war crime," the Conventions provide that only certain acts constitute such exceptionally opprobrious violations of IHL, known as "grave breaches," that parties are obligated to take measures to actively suppress them, largely by implementing domestic legislation criminalizing these acts and prosecuting those who commit them. *See* GCI, *supra* note 397, art. 49 (creating the duty to suppress and prosecute grave breaches of GCI); GCIII, *supra* note

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397, art. 129 (creating same duty under GCIII); GCIV, *supra* note 397, art. 146 (creating same duty under GCIV). Specific grave breaches include, inter alia, "willful killing" and "torture or inhuman treatment; GCI, *supra* note 397, art. 50; GCIII, *supra* note 397, art. 130, and "wilfully causing great suffering or serious injury to body or health . . . or wilfully depriving a prisoner of war of the right of fair and regular trial," GCIII, *supra* note 397, art. 130; *see also* GCIV, art. 147. Only those delicts analogous to felonies under domestic law or violations of norms of *jus cogens* under customary international law, committed by members of the military forces of parties to the conflict constitute grave breaches and thereby impose upon states-parties investigatory and prosecutorial duties, but acts better characterized as misdemeanors do not. *See* ICRC Commentary, *supra* note 398, at 617-20 (elaborating distinctions between grave breaches and other violations of the Geneva Conventions); *see also* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199-236 (1998) (further elaborating this distinction and contrasting state duties with respect to grave breaches and other violations of the Geneva Conventions).

[400] Grave breaches include willful killing or inhuman treatment of protected persons, willfully causing unnecessary suffering, extensive destruction or appropriation of property not justified by military necessity, willfully depriving a POW of the right to a fair trial, taking of hostages, and forcible relocation or deliberate targeting of civilians. *See supra* note 399 and accompanying text.

[401] *See* GCI, GCII, GCIII, GCIV, *supra* note 397, art. 3(1) ("Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . . To this end, the following acts are and shall remain prohibited *at any time and in any place whatsoever* with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds . . . ." (emphasis added)); *see also* GCI, *supra* note 397, art. 46 ("Reprisals against . . . personnel . . . protected by the Convention are prohibited."); *id.* art. 50 ("Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons . . . protected by the Convention: wilful killing . . . ."); GCIII, *supra* note 397, art. 13 ("[POWs] must *at all times* be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a [POW] in its custody, is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no [POW] may be subjected to physical mutilation . . . Measures of reprisal against [POWs] are prohibited." (emphasis added)); *id.* art. 130 ("Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons . . . protected by the Convention: wilful killing . . . .").

with "effective penal sanctions."[402] Extending individual criminal responsibility for violation of the prohibitive regime of IHL still further, the First Additional Protocol to the Geneva Conventions (AP I)[403] frontally rejects the military necessity

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[402] GCIII, *supra* note 397, art. 129. The legal effect of the Geneva Conventions, in the estimation of the ICRC and other NGOs, has been to further extend that prohibitive regime of IHL to encompass within the field of individual criminal responsibility actions that theretofore were either condoned or excused on grounds such as military necessity. *See* ICRC Commentary, *supra* note 398; *see also* OSIEL, *supra* note 23, at 132 n.17 (stating that GCIII prohibits killing POWs "even 'on grounds of self-preservation' or because 'it appears certain that they will regain their liberty'" (quoting GCIII, *supra* note 397, art. 85)). However, the Geneva Conventions are imprecise as to what constitutes "effective penal sanctions," and states-parties may discharge their obligations by prosecuting those whom an investigation indicates may have committed grave breaches. *See* GCI, *supra* note 397, art. 49(2); GCII, *supra* note 397, art. 50(2); GCIII, *supra* note 397, art. 129(2). Moreover, the Geneva Conventions, contemplating a regime of complementary jurisdiction, accord states-parties the latitude to investigate and prosecute under their own domestic laws without obligating them to submit to international supervision. GCIII, *supra* note 397, art. 99(1). Whether states may thereby attenuate their obligations under the Geneva Conventions, by exploiting this indirect enforcement mechanism, is a matter open to debate. *See generally* NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANTARIAN LAW (Michael Bothe et al. eds., 1990) (indicating that the extent to which states-parties to the Geneva Conventions discharge their duties under those instruments varies considerably in substance and procedure); THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 212 (Antonio Cassese ed., 1980) [hereinafter NEW HUMANITARIAN LAW] (noting that some hold that the duty to prosecute grave breaches under the Geneva Conventions is incumbent only upon belligerents while others maintain that universal jurisdiction obligates all states to prosecute grave breaches); M. Cherif Bassiouni, *Repression of Breaches of the Geneva Conventions Under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 RUTGERS-CAMDEN L. REV. 185, 196 (1977) (suggesting that complementary jurisdiction in an international tribunal is contemplated by the Geneva Conventions where domestic prosecution is inadequate or ineffective); Esgain & Solf, *The 1949 Geneva Conventions Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, 4 N.C. L. REV. 537, 580-81 (1963) (discussing variations in imposition of effective penal sanctions for violations of the Geneva Conventions across the range of states-parties); Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783, 792 (1995) (suggesting that the principle of universality of jurisdiction permits states other than the state of nationality of the accused to assert jurisdiction in the event that state does not undertake good-faith investigation and prosecution).

Whether or not states-parties elect themselves to investigate and prosecute allegations of grave breaches of the Geneva Conventions, they remain obligated under the customary international legal principle *aut dedere aut judicare* ("extradite or prosecute"), to which the Geneva Conventions make explicit reference at

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Articles 49, 50, 129 and 146 to either undertake a good-faith investigation and initiate prosecution or, in the alternative, to extradite to a state-party that will do so. M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 4-5 (1995). The United States officially recognizes this obligation as a state-party. *See* U.S. DEP'T OF ARMY, TREATIES GOVERNING LAND WARFARE, DAP 27-1, at 183-84 (1956) (stating that the duty to investigate and prosecute those who commit grave breaches includes not only enemy war criminals but also United States nationals).

[403] *See* API, *supra* note 105. The API, an instrument largely the work of the ICRC, updates the Geneva Conventions in light of an additional three decades of state practice. *See* Solf & Cummings, *supra* note 19, at 219 (tracing the role of the ICRC in the development of the API). The principle supplementation of the API concerns the addition of grave breaches, including making civilians, public works and installations, the ICRC emblem and cultural or religious objects the object of attack and unjustifiably delaying the repatriation of POWs. *See* API, *supra* note 105, arts. 11(4), 85(3)-(4). In addition, the API obligates states-parties to cooperate with the U.N. "in situations of serious violations of the [Geneva] Conventions or of [the API]," *id.* art. 89, as well as with international fact-finding commissions, *id.* art. 90, in the suppression of grave breaches. The API has come under criticism for introducing controversial positions into IHL, including the legitimization of decolonization, *id.* art. 1(4), the legal protection of terrorists, *id.* art. 44, the withdrawal of the protection of GCIII from mercenaries, *id.* art. 47, the definition of a military objective, *id.* art. 52, and the prohibition of attack upon certain military objectives, *id.* art. 56, and the question of whether these or other provisions of API are binding upon non-parties as customary IHL or as norms of *jus cogens* is open to considerable debate and will be discussed infra at note 437. Although most states have ratified the API, a number of states have either declined ratification or attached a series of reservations purporting to limit legal obligations under that instrument despite ratification. *See* NEW HUMANITARIAN LAW, *supra* note 402, at 243 (noting that the "Western powers" were "very reluctant" to embrace API without reservations); David Turns, *Prosecuting Violations of International Humanitarian Law: The Legal Position of the United Kingdom*, 4 J. ARMED CONFL. 1 (1998) (describing the U.K. position with respect to API and the reservations it has taken to that instrument limiting domestic prosecutions for violations of its provisions). The United States has signed the API but since taken the position that it is a "fundamentally flawed" instrument that would "politicize [IHL] and efface the distinction between terrorists and lawful combatants, and accordingly has not ratified that instrument. *See* Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419, 431 (1987). Nonetheless, the United States has publicly accepted that some of the provisions of the API are declaratory of customary IHL and are thus binding in courts of the U.S., but no official statement clarifying precisely which provisions has been offered. For an argument that API is neither customary IHL nor expressive of norms of *jus cogens* and, therefore, not binding upon non-parties, *see* Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 766 (1994) ("It is generally accepted that the Geneva Conventions have achieved the status of customary international law even if Pro-

defense and reinforces the absolute, nonderogable obligations to grant quarter and refrain from reprisal[404] incumbent upon parties to AP I and, arguably, as a matter of customary IHL,[405] even in regard to a parole violator captured under arms.[406]

Although national military establishments had labored for much of the nineteenth and early twentieth centuries to defend against encroaching legal absolutism with a pragmatic approach that privileged necessity in its intersection with humanitarianism, the military manuals of the leading powers in the aftermath of World War II began to reflect a generalized strategic withdrawal from this position toward an accommodation, and even a convergence, with the treaty-based regime codified in the Geneva Conventions.[407] Specifically, in 1956, United

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tocol I . . . ha[s] not."). For a contrary argument, see Kenneth J. Keith, *Rights and Responsibilities: Protecting the Victims of Armed Conflict*, 48 DUKE L.J. 1081, 1095 (stating that although some commentators consider the API to be an instance of "la trahison des clercs" (treachery of the intellectuals), the fact that more than 150 states have ratified suggests that it has become declaratory of customary IHL).

[404] *See* API, *supra* note 105, art. 40 ("It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis."); *see also id.* art. 41(1) ("A person who is recognized or who, in the circumstances, should be recognized to be hors de combat, shall not be made the object of attack."). The obligations created by API with respect to quarter are absolute, even in the case of a greatly outnumbered unit physically unable to take prisoners. *Id.* art. 41(3) (requiring that even "under unusual conditions of combat which prevent . . . evacuation [of enemy POWs] . . . they shall be released and all feasible precautions shall be taken to ensure their safety.").

[405] *See supra* note 403 and accompanying text.

[406] The Geneva Conventions recognize that POWs who are paroled "are bound on their personal honour scrupulously to fulfil . . . . the engagements of their paroles or promises." GCIII, *supra* note 397, art. 21. However, under Article 20, reprisals are expressly prohibited against parole violators who are entitled to judicial process and to the protected status of POW in the interim. *See* GCIII, *supra* note 397, art. 85 (stating that POWs "prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention"); PICTET, supra note 12, at 181 (stating that the Geneva Conventions afford parole violators the opportunity to defend against charges of breaking parole).

[407] *See* W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, *in* 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1 (Horance B. Robertson, Jr. ed., 1991)

States Army, Rules of Land Warfare, Field Manual 27-10 (FM 27-10),[408] declared denial of quarter[409] and reprisal against POWs[410] to be categorically illegal as a matter of international and domestic law and, save for exceptional circumstances, non-justifiable by military necessity.[411] Moreover, FM 27-10, an affirmation of principles of existing IHL in light of the experience of World War II[412] that were promulgated "to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare,"[413] directly addresses the question of whether military necessity can ever justify denial of quarter in the negative:

> A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that

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(discussing this trend).

[408] *See* RULES OF LAND WARFARE (1956), *supra* note 43. FM 27-10 was updated without significant changes in 1976.

[409] *See id.* ¶ 28 ("It is especially forbidden . . . to declare that no quarter will be given." (citation omitted)); *id.* ¶ 29 ("It is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion. (citation omitted)).

[410] *See id.* ¶ 497(c) (stating that reprisals "against the persons or property of [POWs] . . . are forbidden," although reprisals against enemy forces not yet in the control of the United States forces are permitted (citing GCIII, *supra* note 397, art. 13)).

[411] *See id.* art. 3 (stating that the "prohibitory effect of the law of war is not minimized by 'military necessity' which has . . . been generally rejected as a defense for acts forbidden by the customary and conventional laws of war."). Some scholars argue that FM 27-10 effected the complete rejection by the United States Army of the defense of military necessity to allegations of war crimes. *See, e.g.*, WALZER, *supra* note 12, at 130-31 (stating that since FM 27-10 an accused soldier can no longer "justify his violation of the rules by referring to the necessities of his combat situation or by arguing that nothing else but what he did would have contributed significantly to victory"). However, the use of the language "generally rejected" seems to suggest that some vestige of a military necessity defense might yet remain available to a defendant charged with violation of the provisions of the UCMJ.

[412] *See* WELLS, *supra* note 12, at 11 (discussing the drafting of FM 27-10, written primarily by Prof. Richard Baxter of Harvard Law School and an officer in the United States Army JAG Corps). FM 27-10 has been as influential in the transformation of the military regulations of other states as was the Lieber Code in the nineteenth and early twentieth centuries.

[413] RULES OF LAND WARFARE (1956), *supra* note 43, ¶ 1.

> they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war.[414]

Finally, FM 27-10 identifies the grave breaches of the Geneva Conventions to include denial of quarter and reprisal as punishable war crimes[415] under the UCMJ[416] and imposes upon those under UCMJ jurisdiction the duty to refuse to obey illegal orders and to report violaions of FM 27-10 and the UCMJ.[417]

However, despite their willingness to incur limitations upon their sovereign prerogatives, states, with respect to the denial of quarter, have cleaved far more closely to their historical pattern than to the modern prohibitory regime. During the Korean War (1950-1953), North Korean forces, unwilling to spare food for POWs, frequently shot them instead,[418] and in the Sinai Campaign (1956), Israeli forces claiming military necessity, executed scores of Egyptian POWs.[419] In 1962, Egyptian forces intervening in Yemen routinely executed POWs as a matter of official policy.[420] During the Vietnam War (1954-1975), political pressure to maximize the number of enemy dead (known as "body counts") as tangible evidence of battlefield successes, coupled with the psychological stress of combat, led United States forces and their allies to deny quarter and undertake reprisals.[421] The summary execution of POWs is

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[414] *Id.* ¶ 85. FM-27-10 states further that military necessity is "generally rejected as a defense for acts forbidden by the . . . laws of war." *Id.* ¶ 3.

[415] *See id.* ¶ 502 (listing, inter alia, "wilful killing" of POWs as violations of the Geneva Conventions); *id.* ¶ 504 (listing, inter alia, "[k]illing without trial spies or other persons who have committed hostile acts" as a punishable war crime).

[416] *See id.* ¶ 506(c) (stating that grave breaches of the Geneva Conventions and other war crimes "committed by persons subject to United States military law . . . constitute acts punishable under the [UCMJ].").

[417] U.S. DEP'T OF ARMY, *supra* note 288, at 101.

[418] *See* EUGENE KINCAID, WHY THEY COLLABORATED 43 (1953) ("In the first five months of the [Korean] war, North Korean . . . often shot soldiers they could have taken prisoner . . . simply because they did not want to bother with them; . . . [t]hey had little food . . . and they had no place to put them.").

[419] In October 1956, an Israeli parachute infantry company inserted 100 miles behind enemy lines near the Mitla Pass in Sinai captured a platoon of Egyptian troops. However, Egyptian forces in the vicinity, which already greatly outnumbered the Israelis, were increasing, and the Egyptian Air Force enjoyed operational superiority. Ordered to redeploy elsewhere to prepare for another parachute insertion, and without adequate numbers to guard or relocate the POWs, several of whom were taunting forces with the threat that "the Egyptian Army will

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slaughter you!," the Israeli commander positioned the POWs face-down in the sand and directed their execution, claiming years later that military necessity justified his actions. *See* Morris, *supra* note 283, at 905-08 ("[I] didn't give an explicit instruction, and I didn't ask for one. Only a fool can ask his commander for permission to do what he has to do.") (quoting General Arye Biro of the Israeli Defense Forces (Ret.), then-commander of the company in question). Similar allegations of Israeli treatment of Egyptian POWs are leveled in a recent work. *See., e.g.*, JAMES BAMFORD, BODY OF SECRETS 201-02 (2001) (claiming the IDF, without supplies and unable to safely detain prisoners, killed as many as 1000 Egyptians near the coastal town of El Arish on June 8, 1967).

[420] MICHAEL B. OREN, SIX DAYS OF WAR 15 (2002).

[421] Numerous sources document a widespread practice of denying quarter during the Vietnam War. *See, e.g.*, AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL (John Duffet ed., 1968). Much of the responsibility for this practice is attributed to the pressure to produce body counts to satisfy domestic critics of the war as well as public opinion that American military operations were succeeding. *See, e.g.*, *The Interrogation of Captain Howard Turner at the Trial of Lieutenant James Duffy 1970*, *in* CRIMES OF WAR, *supra* note 276, at 246-47 (stating that the policy that United States forces would deny quarter was not instituted by formal order but rather emerged from pressure to produce "body counts" emanating from the highest echelons). In the absence of orders to the contrary, the pressure to increase enemy dead was translated at the company and platoon level and tacitly authorized by higher echelons as an order to deny quarter, as the following statement by an infantry platoon commander in 1969 illustrates:

> I decided I was not going to take any more prisoners. If at all possible I was not going to let the situation arise where a prisoner might be taken. . . . I told all my men that if they were going to engage someone, not to stop shooting until everyone was dead. . . . Nobody ever said anything against this policy and I think most of the men agreed to it. My company commander felt the same way I did about it.
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> . . .
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> I know in my case, platoon leaders never got any guidance on treatment of prisoners. Battalion HQS never said anything about them. There was no SOP, there was never a request that we take any prisoners. The only thing we ever heard was to get more body count, kill more VC! We heard that all the time; it was really stressed. . . . The only way anybody judged a unit's effectiveness was by the number of body counts they had.

thus a present feature of enduring conflicts wherein military necessity abuts conflicting legal prohibitions.[422]

The schizophrenic quality of state conduct, revealed in the disjunction between concrete expressions of commitment to evolving IHL and serial violations of that very regime, has not escaped the notice of contemporary commentators who themselves are divided on the question of quarter. For one group "circumstances arise when military necessity . . . causes [rules]

. . .

> That is really the only mission we have in the field, to kill the enemy."

Lieutenant Duffy's Statement, *in* CRIMES OF WAR, *supra* note 276, at 250-51, 253.

Combat-invoked emotions such as rage and the desire for revenge contributed to the denial of quarter as well. *See id.* at 248 ("Before these two friends were hit I had sort of a lukewarm feeling against the enemy. But after seeing them hurt so bad I had a true hatred for all VC and from then on I wanted to kill as many of them as I could."); TAYLOR, *supra* note 13, at 36 (noting during the Vietnam War that "[i]n the heat of combat, soldiers who are frightened, angered, shocked at the death of comrades, and fearful of treacherous attacks by enemies feigning death or surrender, are often prone to kill rather than capture."); Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 12 (1972) (noting that orders given to company commanders before the battle of My Lai to effectively deny quarter were issued in part as a matter of revenge against a "hidden enemy that have been clobbering us" and from whom it was now possible to "get our pound of flesh").

[422] *See* WALZER, *supra* note 12, at 308 (indicating that, although denial of quarter is becoming rare, the practice continues); Wasserstrom, *supra* note 28, at 50 (stating that denial of quarter remains common practice). During the Gulf War in 1991 the *U.S.S. Nicholas* fired upon Iraqi oil platforms, in the process killing Iraqi troops attempting to surrender, because the platforms housed intelligence equipment that placed the *Nicholas* in jeopardy. Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 227 (1998) (indicating United States personnel were exonerated of wrongdoing by a review board). In 1993, an Israeli special forces unit, Shayetet 13, was conducting anti-terrorist operations near a terrorist camp in Lebanon when it was discovered by a group of terrorists. Shayetet 13 killed one terrorist and captured a second but a third escaped. The captured terrorist attempted to escape despite having been bound with rope, and after the commander was refused permission to evacuate the terrorist with his unit, he elected to disable him by shooting his legs. Despite his wounds, the terrorist was able to escape into nearby brush, and the commander, concerned that permitting escape would endanger his force, ordered one of his soldiers to execute the terrorist. Upon formal investigation, the Israeli JAG determined that the commander had acted out of military necessity in preserving his men and his mission and that no charges should be specified against any persons. *See* Bagaz 2888/99 Advocate Holander v. Hayoaz Hamishpati Lamemshala (Isr. 1997).

to be disregarded," and "[s]mall detachments on special missions" ordered to execute strategic missions deep behind enemy lines are justified by military necessity[423] in denying quarter to enemy forces on the ground that to release prisoners would "greatly endanger the success of the mission[s] or the safety of the unit[s]."[424] To permit enemy forces the freedom to jeopardize the mission or the survival of one's own forces would, for this scholarly camp, constitute an exercise of "asinine ethics."[425] Furthermore, this non-absolutist camp accepts that denial of quarter may be excusable, or at the very least not the cause for severe legal remonstrations, by reference to the psychological dimensions of the circumstances giving rise to the decision to refuse surrender[426] and to the moral and legal culpability of the soldier(s) offering surrender. Parole violators, by virtue of their own misconduct, expose themselves to the penalty of death,[427] even if they remain entitled to due process in a judicial forum.[428] Expressions of outrage at their perfidy that take the form of summary execution are understandable, if not permissible, under positive law. Other scholars argue that the legal prohibition against denial of quarter is absolute and that even in the unusual circumstance where the grant of quarter would threaten the mission or the lives of the forces to whom an offer of surrender is made, there can be no exception *in extremis*: "The law is quite clear . . . Quarter may not be denied nor may prisoners be executed because they are burdensome."[429] Viewed through this optic, it is an "obligation of sol-

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[423] Taylor, *supra* note 13, at 36. Some scholars, in supporting a military necessity exception to a general rule prohibiting denial of quarter, restrict the application to colorable circumstances requiring the execution of POWs in the interest of self-preservation, thereby disallowing justifications predicated primarily upon concerns that their release might compromise missions. *See* WALZER, *supra* note 12, at 305 n.* ("But if it is only the safety of the unit that is in question . . . the proper appeal would be to self-preservation, [as] [t]he argument from necessity has not . . . been accepted by legal writers, [while] the argument from self-preservation has won greater support."); Cohen, *supra* note 67, at 78 ("[E]ven those who say that the prisoners may be killed are not necessarily relying on the principle of military necessity—a much narrower principle of (state) self-preservation will suffice.").

[424] TAYLOR, *supra* note 13, at 36 (stating further that "no military or other court has been called upon, so far as I am aware, to declare such killing a war crime."); *see also* BEST, *supra* note 20, at 349 (recognizing that when "hard-pressed troops in continuing action find themselves with prisoners on their hands whom they have no means to conduct under guard to safety away from the combat zone," denial of quarter is neither unexpected nor unjustifiable on the ground of necessity); OSIEL, *supra* note 23, at 355-56 (allowing that despite the absolutist language of sources of conventional IHL, the general practice of states reveals that military necessity can still be invoked in justification of the denial of quarter under circumstances where to grant quarter would compromise the outcome of a mission); WALZER, *supra* note 12, at 250 ("In a supreme emergency, indeed, it may be necessary 'to hack one's way through . . . .'").

[425] MAO TSE TUNG, BASIC TACTICS 98 (1966) (stating in explanation that in the case described by other authors it is impossible to take prisoners and that if it is not feasible to disarm and disperse enemy forces it is obligatory to execute them).

[426] *See* BEST, *supra* note 20, at 348-49 (stating that "[t]here are limits to the amount of humanitarian observance that desperately fighting flesh and blood can actually stand" and that "when a well-protected machine-gunner, defending his safely-retreating compatriots, succeeds in killing a great many of his attackers before at the last moment emerging (if he is *very* unwise, with a confident smile)

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to surrender to their surviving mates," that grief-stricken and enraged soldiers should deny quarter to the would-be POW should not come as a surprise); MCDOUGAL & FELICIANO, *supra* note 140, at 575-76 ("It may be observed that in case of close and sustained combat in land war, where the signal of surrender is postponed and resistance continued to the very last moment, quarter may in practice be difficult [due to the emotional state of the attackers] to grant.").

[427] *See* Brown, *supra* note 240, at 212 (noting that the death penalty remains among the sanctions currently available to punish parole violators); HINGORANI, *supra* note 14, at 65 (noting that surrendering soldiers who have committed war crimes pre-capture are occasionally denied quarter on this ground).

[428] POWs who violate parole are disentitled to POW status but may not be subjected to summary execution and are entitled to defend themselves against the charge of breach of parole. *See* GCIII, *supra* note 347, art. 5 (stating that POWs are entitled to protection from the time of capture until repatriation); *id.* art. 85 (stating that POWs may be prosecuted under the laws of the detaining power for acts committed pre-capture); Hague Convention of 1907, *supra* note 96, art. 12 (stating that a parole violator recaptured bearing arms must "be brought before the courts.").

[429] FEILCHENFELD, *supra* note 219, at xi; *see also* ROGERS, *supra* note 42, at 147 ("A long-range patrol ambushes a group of enemy soldiers and in the exchange of fire kills all its members except one who is wounded. A soldier is ordered to kill the wounded man because the patrol cannot take him with them and if he is left behind he may endanger the patrol by reporting its existence. The order is illegal, so the soldier carrying it out would be liable to prosecution."); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 103 (1959) ("A commander is not entitled to kill his prisoners to preserve his own forces, even in cases of extreme necessity. . . . [whether] because they slow up his movements, weaken his fighting force because they require a guard, consume supplies, or appear certain to be set free by their own forces."); Mark S. Martins, LTC, Deputy Staff Judge Advocate, XVIIIth Airborne Corps (Oct. 2, 2000) (stating that each member of the United States Army recognizes that "you may find yourself behind

diering as an office" to accept the additional risks posed by the release of POWs,[430] and the killing of enemy forces that have indicated their intention to surrender is always a war crime[431] immune from excuse or justification.[432] Enemy soldiers over whom military personnel are unable to exercise custody without compromising their own safety or the success of their mission simply cannot be dispatched, although they may be otherwise rendered incapable of inflicting injury.[433] Moreover, reprisal is categorically prohibited.[434] In short, an exegesis of scholarly texts demonstrates little more than that the academic community is a house divided on the question of the legality of the acts and omissions at issue.

In the sixty years since the court-martial of Private Ryan, the positive rules of IHL and the military regulations governing members of the Army have waxed increasingly formal and prohibitive,[435] drawing the legal issues of the conduct at issue into sharper focus and thereby increasing the likelihood that the defendants' conduct would be discerned as illegal and be

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enemy lines, and in order not to be a war criminal you may have to expose your mission. You accept this as the quiet professional you are.").

[430] WALZER, *supra* note 12, at 305.

[431] *See* U.S. DEP'T OF ARMY, *supra* note 288, at 100 (stating that even under extreme circumstances "[t]he decision to execute (murder) the prisoner . . . is . . . a war crime . . . , and . . . the one doing this can be tried and executed.").

[432] Some members of the absolutist school of thought accept the argument that a superior orders defense might serve as a partial excuse where the accused lacked any possible moral choice other than to deny quarter. *See, e.g.*, Wasserstrom, *supra* note 28, at 58 (stating that a superior orders defense to a charge of denial of quarter is available only to those accused who were subject to execution as the "announced, probable, and understood penalty for disobedience" and as a result lacked true moral choice in determining whether to follow the order).

[433] Capturing forces may take actions to reduce the threat posed by the release of enemy POWs provided such measures are "legal, humane, and . . . fit the military situation." *See* U.S. DEP'T OF ARMY, *supra* note 288, at 100 (stating that such options include the detachment of several soldiers to evacuate the POW, the binding and gagging of the POW for forced march in accompaniment of the detaining forces and the secreting of the POW in a hidden location for subsequent evacuation).

[434] Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972) ("[C]oming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection.").

[435] *See supra* note 281 and accompanying text.

prosecuted. Moreover, a number of Army courts-martial over the past several decades have sentenced soldiers to periods of confinement for the crime of murder arising from denials of quarter,[436] providing important precedent as to applicable law as well as guidance to a jury in determining whether and how far the conduct of the defendants departed from that expected of honorable members of the martial profession. Thus, it is not inconceivable that a court-martial convened in 2004 might accept the absolutist pronouncements of the drafters of the various IHL instruments, which brook no claims that military necessity or lack of knowledge about the boundaries of the permissible in combat can ever absolve an accused of even partial legal responsibility for violations, and thus conclude, upon the same evidence available to the court-martial of 1944, that military necessity as it has been shaped by the evolution of positive law and practice can no longer be invoked to justify the denial of quarter and that, given the much broader dissemination of knowledge about and training in IHL to which Upham had been exposed, in the form of FM 27-10 and a much more intensive military education,[437] Upham either knew or should have known that the killing of a POW was manifestly unlawful. A present-day court-martial might therefore conclude that denial of quarter was categorically illegal under the UCMJ and that the defenses accepted in partial mitigation of sentence—necessity and ignorance—are unavailable to T/5 Upham, whose deeds dragged his brothers-in-arms into disrepute and who thus deserved public disassociation from the corps of honorable soldiers. By this analysis, Upham would be convicted of murder or manslaughter and serve a lengthy prison sentence.[438]

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[436] *See, e.g.*, United States v. Keenan, 18 C.M.A. 108 (1969) (holding that there is an absolute duty to disobey an order to deny quarter and sentenced a soldier convicted of denial of quarter to five years imprisonment). During the Vietnam War, U.S. courts-martial tried over 100, and convicted sixty, defendants for the crime of murder. *See* BISHOP, *supra* note 146, at 291.

[437] The API imposed upon parties the duty to ensure that "legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject." API, *supra* note 105, art. 82. Although the United States does not concede any specific legal obligations under the API, in the past twenty years United States Army JAG lawyers, whose mission is "to provide professional legal services at all echelons of command throughout the range of military operations" and to provide authoritative guidance to soldiers of all ranks in the lawful discharge of their duties, have accomplished the purpose of article 82, transforming the defense of ignorance to simultaneously render it less frequently available but, where available, more likely to succeed. U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (2000) [hereinafter FM 27-100]. Determining the extent of law applicable to combat has become an increasingly complex endeavor in a modern era in which nonstate actors and other nontraditional combatants have proliferated, technologies have become more potent and more precise, and instruments purporting to declare IHL have continued to accrete. *See generally* Timothy P. Bulman, *A Danger-*

However, this outcome is as unlikely at present as it would have been in the last year of World War II, even conceding that

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ous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other than War, 150 MIL. L. REV. 152 (1999) (noting that the failure of the United States to authoritatively state which provisions of the Geneva Conventions and Additional Protocols are binding frustrates attempts at compliance by combat commanders); Shefi, *supra* note 344, at 119-20 (stating that translating the "prolific development" in IHL, much of it unclear, into something of use to soldiers who are "usually more preoccupied in fulfilling the task of insuring military success than in carrying out the law" requires significant study, guidance and expertise typically to be found only in JAG lawyers). Despite the trends in law, technology and strategy, the expert legal guidance provided by JAG lawyers at all phases of the planning and execution of military operations denies the combat commander the opportunity to claim a lack of knowledge that his actions are legally impermissible, on the contemporary battlefield, "[w]here time permits, it is now objectively unreasonable for a [sic] American commander to refrain from consulting such a legal advisor whenever there is any ground for doubting the legality of a contemplated use of force." OSIEL, *supra* note 23, at 345. Modifications to military manuals have augmented the work of JAG lawyers in enhancing "awareness of the objects of the use of force and sensitivity to ethical, moral, and legal considerations in the conduct of warfare." R.R. Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165, 183 (1978). The supporting system of military education further inculcates soldiers in their legal obligations during wartime through courses in IHL conducted in basic and advanced individual training, as well as at the Army JAG School. For a complete listing of all such courses in the system of United States Army military education, see The Center for Law & Military Operations *at* http://www.jagcnet.army.mil/CLAMO.

[438] Although not without a legal foundation, such a punishment would run the risk of criticism as a "revisionist moral judgment half a century after the fact" that elides the question of fundamental fairness to a defendant whose conduct, by the standards of his era, was neither manifestly unlawful nor wholly at odds with the martial code. Webb, *supra* note 354, at A22 (making this argument in regard to criticisms over United States hesitancy to investigate allegations of United States massacres of civilians in the Korean War).

IHL is in a constant state of development and that acts which would have been permissible at one point in time have been proscribed with the progression of that regime.[439] Although the post-World War II revision of military regulations in reflection of the increasing absolutism in the IHL regime may overcome any hesitancy to investigate and charge the defendants, the ultimate determination of their guilt or innocence remains the responsibility of their peers, for whom, despite the codification of a prohibitory legal regime, the defenses accepted in partial mitigation by the 1944 court might be at least as persuasive. Moreover, neither the regime of IHL nor FM 27-10 are directly incorporated in the UCMJ,[440] and, notwithstanding the fact that these sources directly proscribe the conduct in question, the jury, in evaluating the defendants' conduct, would likely be instructed, consistent with the rights that defendants are guaranteed under the system of courts-martial, to consider whether a defense such as military necessity, under the specific circumstances, could justify killing an enemy parole violator who posed a potential threat to their physical safety and the success of their mission. By the same token, the 2003 jury would be instructed to determine the extent to which ignorance of IHL, a body of regulation no less difficult for the enlisted soldier to fathom than that which existed in 1944, should be considered in defense or in mitigation of the charge of murder, as well as the extent to which state practice in regard to denial of quarter should be considered in determining whether Upham comported himself in the manner expected of soldiers.[441] Furthermore, the similarity of the threat posed by Islamic terrorists to the Nazi regime might sway jury members toward acquittal or toward a sentence that nullifies the legal consequences of a guilty verdict, and the jury might well struggle toward the conclusion that Upham, despite having committed a technical violation of the laws of war, violated none of the constitutive tenets and precepts of the martial code in taking reprisal against a parole violator and that, although he ought not be extolled as the epitome of martial honor, Upham merits mere disciplinary, rather than penal, sanctions, particularly in the context of a threat to fundamental interests such as is posed by the intersection of international terrorism and the proliferation of WMD. On the basis of this finding, the jury might well impose lenient sanctions similar to those pronounced by the 1944 court-martial.

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[439] An example in support of this assertion is the "March to the Sea" by General William T. Sherman in 1864-65 during the United States Civil War, during which Union forces committed acts legal at that time that would today constitute grave breaches of IHL, including denial of quarter and deliberate destruction of civilian property. *See generally* Thomas G. Robisch, *General William T. Sherman: Would the Georgia Campaigns of the First Commander of the Modern Era Comply with the Current Law of War Standards?,* 9 EMORY INT'L L. REV. 459 (1995).

[440] *See* 10 U.S.C. § 832 (2003).

[441] IHL may well remain as impenetrable to the average enlisted mind today as it did in 1944. *See* U.S. DEP'T OF ARMY, DAP 27-161-2, II INTERNATIONAL LAW, 246 (1962) (conceding that ignorance of IHL may well excuse soldiers from liability for its violation). Although the United States has mandated adherence to IHL at all times in every military operation as official policy, it has made little if any

In summary, the essential point is that a determination of the legal responsibility of a soldier accused of a violation of IHL

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effort to authoritatively determine which of the various sources of conventional and customary IHL creates legal obligations that bind the United States Armed Forces. *See* Bulman, *supra* note 437, at 166-74 (discussing United States failure to specify with precision the obligations it accepts under IHL and suggesting that, until such a specification is forthcoming, the best insight into United States policy with respect to the extent of these obligations is an observation of United States practice). Although federal legislation enacted in 1996 indicates that the grave breaches provisions of the Geneva Conventions, various articles of the Hague Conventions of 1907 and the texts and protocols of "such convention[s] to which the United States is a party" are applicable sources of law in the domestic prosecution of "war crimes" in federal district courts, as of 2003 IHL remains such a muddled and conditional body of regulation that, with the exception of manifestly unlawful acts, it is virtually impossible for soldiers to know with certainty what is prohibited in war. *See* War Crimes Act of 1996, *supra* note 282 (enumerating various provisions of IHL, the violations of which constitute criminal offenses punishable in federal district courts, although not displacing courts-martial jurisdiction in the case of military personnel). Moreover, enlisted soldiers inquiring of their superiors as to whether their orders are lawful in a desire to tailor their conduct in accord with the law might find themselves simply told "Not to worry, the complexities are beyond your ken; just obey the order, unless it calls for atrocities." OSIEL, *supra* note 23, at 108. Consequently, soldiers today attempting to meet their legal obligations might be left with no more guidance than their peers of 1944, and the absence of support at higher levels in the chain of command might well be dispositive of whether a superior orders defense is permitted. *See infra* note 314 and accompanying text (discussing the superior orders defense).

under the system of military justice entails a searching inquiry by fellow members of the military community—the group most directly injured in reputation as well as life and limb by violations of the martial code and thus the party with the greatest incentive standing to complain of violations and to police its own ranks—conducted under conditions of relative normative autonomy.[442] The purpose is to ascertain not whether the accused ran afoul of a provision of positive law drafted by outsiders without obligations to the martial caste, but whether, in consideration of all the surrounding circumstances, the accused can fairly be said to have failed in his duty to his brothers-in-arms by engaging in unchivalrous or otherwise reprehensible acts that shock the martial conscience and would, if unpunished, shame and dishonor the martial profession. Although the normative universe in which this admittedly more parochial compliance mechanism[443] operates refuses to accept the subordination of its internal values to external review or to impose punishment for acts undertaken in self-defense or in furtherance of the military mission, it is ultimately conducive to a more holistic and stricter standard of judgment, for despite the absence of any provision of IHL proscribing a particular act, a court-martial might well adjudge the author to have transgressed against his obligation under the martial code.[444] In sum, within the decisional culture of the martial code, positive law is significantly less dispositive of the boundaries of permissible conduct and of the consequences for overstepping these boundaries than the ethical judgments of members of the profession of arms.[445] Nevertheless, a court-martial convened today to evaluate the conduct of Private Ryan is likely to accept that T/5 Upham, while not wholly blameless, has neither committed an act worthy of professional banishment nor demonstrated himself beyond moral redemption, and the punishment levied under the martial code is likely to foster his rehabilitation and continued service to the military mission: now, as then, the defense of civilization.

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[442] Proponents of the martial code rest their faith on two principle assumptions. The first is that "actions performed by professionals in professional roles can be evaluated only with respect to criteria internal to the professional practice." *See* Arthur Applbaum, *Are Lawyers Liars?,* 4 LEG. THEORY 62, 73 (1988). The second is that "[a]n approach to professional ethics that casts itself as an interpretation of [the] ordinary moral experience [of soldiers] . . . would do well to stay close to the terms of soldiers' self-understanding." OSIEL, *supra* note 23, at 18. To falsify the first assumption it would be necessary to demonstrate that professionals are less well-suited to self-regulation than outsiders; to attack the second it would be necessary to show that soldiers' understandings of the requirements of their profession and the moral experiences associated with soldiering can be readily moulded by external, particularly legal, regulations that are contrary to those understandings and experiences. For reasons discussed supra, attempts to falsify either assumption and impose legal modification inconsistent with the values that are internal to the military caste are unlikely to prevail. *Id.* at 164-65 (stressing that the only legal regulations likely to transform the behavior of soldiers are those which build upon "existing commitments and self-understandings.").

[443] *See* ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY 5 (1979) (labeling as "compliance mechanisms" the informal institutions that structure the incentives to obedience of subgroups through "efforts to mold the underlying criteria of evaluation that actors use in their decision making").

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[444] In other words, as compared to the judicial model, the martial code:

> While . . . strict on the rules themselves, it is relatively more lenient in allowing exceptions to them . . . [It] allows a small area at either extremity, that which is absolutely permissible and that which is absolutely impermissible, but concentrates its energies upon the middle ground where the debate takes place. Transgressing the boundaries becomes something which requires justification . . . In addition to the realms of [clear] permission and prohibition is the area of debate where what is normally prohibited can be argued for if the circumstances are sufficiently compelling.

OSIEL, *supra* note 23, at 286 (quoting IAN CLARK, WAGING WAR 75 (1988)). Put differently, humanization of war is the product of overweening notions of custom, honor and professionalism, and "there is no substitute for honour as a medium for enforcing decency on the battlefield, never has been, and never will be." John Keegan, *If You Won't, We Won't: Honour and the Decencies of Battle*, TIMES LITERARY SUPP. (London), Nov. 24, 1995, at 11.

[445] "Law is only one among several kinds of norms that govern [martial] life. In striving to influence a given societal sphere, law ignores these other norms, assuming its supremacy over them, at its peril. . . . Law's efforts to avoid atrocity inevitably intersect with and rely upon the continuing efficacy of these other norms and mechanisms, which have historically played a much greater role toward this end." OSIEL, *supra* note 23, at 163. More general research suggests that formal legalization, while it may advance the interests of "compliance communities"—particularly lawyers whose influence and financial interests are served thereby—does not enhance compliance in every context and is not necessarily preferable to regulation by other means, including professional self-regulation. *See generally* Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L ORG. 661 (2000).

B. Trying Captain Ryan: International Legal Absolutism, Allegations of Crimes in the War on Terror and the International Criminal Court

1. International Legal Absolutism: The Judicial Model

Legal absolutists,[446] deeply skeptical that professional self-regulation can suppress violations of IHL by members of the armed forces whose mission, after all, is to win wars rather than to observe law,[447] and unwilling to cede any regulatory terrain, reject martial honor as a thoroughly inadequate substitute for the judicial model.[448] For legal absolutists, the norms to which individual soldiers must adhere are not fixed by professional practice and internal socialization but are exogenously determined and imposed by state acquiescence to external regulations codified in IHL treaties.[449] A penchant for management by law overrides considerations of non-legal solutions to practical problems, and the threat of harsh punishment, rather than the compliance pull exerted by an internal code of conduct, is necessary to condition and influence the battlefield behavior of soldiers cossetted behind military culture; thus, only a powerful ICC, freed from the influence of self-interested states and their military establishments and superior in the hierarchy of sources of rules and regulations, can promote respect for and observance of IHL. Furthermore, for legal absolutists, ignorant of the moral universe of soldiers and distrustful of military self-judgment,[450] claims in defense of acts otherwise classed as violations of IHL, reliant as they are upon

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[446] "Legal absolutism" is the school of thought that posits that it is never justifiable to violate positive law in the pursuit of moral values as law, and that the universal distillation of natural legal principles and moral virtue, is the highest value human beings can serve; in contrast, legal relativism holds that where a positive law is intolerably incompatible with the requirements of justice, the provision of positive law must be disregarded. See generally GUSTAV RADBRUCH, PHILOSOPHY OF LAW (1932) (elaborating theory of legal relativism). For a thorough discussion of legal absolutism and legal relativism, see generally KENNETH CAUTHEN, NATURAL LAW AND MORAL RELATIVISM (1998).

[447] *See generally*, OSIEL, *supra* note 23 (explaining that even many of those who cannot be classified as legal absolutists are suspicious of military self-regulation). When challenged, legal absolutists point to the failure of the successively revised editions of the military manuals of leading states to directly incorporate the proliferating series of declarations of new sources of customary IHL as evidence that the military profession is insufficiently committed to the principles underlying IHL. WELLS, *supra* note 12, at 17. Although courts-martial are sometimes accused by civilian critics of offering defendants inadequate procedural protections against the influence of commanders bent on securing their convictions, some legal absolutists further fault courts-martial as an overly lenient institution that abuses the privilege of self-regulation to insulate its members from deserved punishment. *See* BISHOP, *supra* note 146, at 22 (condemning military justice as a regime that "*knows what it wants* and it systematically *goes in and gets it.*"). Legal absolutists making the latter of these criticisms ignore evidence controverting the notion that courts-martial are a rubber-stamp for commanders. *See* David A. Schleuter, *Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 1-29 (1991) (discussing decades of revisions to system of courts-martial that have enhanced fairness to parties and the integrity of proceedings).

[448] By and large, the civilian polities of democratic states, who for reasons beyond this work, disparage the concept of martial honor and despise the martial caste, are quite willing to impose dangerous legal constraints and uninformed retrospective moral judgments upon their armed forces, and they are unwilling and in many cases unable to critically evaluate the argument that military honor

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is superior to other institutions in suppressing violations of IHL. OSIEL, *supra* note 23, at 39-40 (discussing the legal consequences of the disjunction between civilian society and the military profession within democratic states).

[449] *See* James D. Morrow, *The Institutional Features of the Prisoner of War Treaties*, 55 INT'L ORG. 971, 973, 990-91 (2001) (reinforcing legal absolutist assumption that IHL treaties are the source, not the reflection, of the norms and decisions that govern war, and that states pattern their conduct and "shape their treatment" of protected persons after "understandings" created by treaties rather than mould and interpret treaties to reflect conduct considered legitimate by their military establishments).

[450] Legal absolutists tend to hail from the ranks of those with no military experience and even less interest in acquiring insight into the moral universe of soldiers than their fellow civilians, and, as such, they tend to be much more critical of soldiers' conduct than do those whose greater understandings temper any impulses to condemn. OSIEL, *supra* note 23, at 162-63; *see also* RAMSEY, *supra* note 45, at 503 (describing legal absolutists as very often "intellectuals and churchmen who have forgotten if they ever knew the meaning of a *legitimate* military target . . . [and] simply do not know the qualitative difference between 'murder' and 'killing in war.'"). Distrust of and disdain for soldiers' moral competence to self-regulate is so great that for legal absolutists, soldiers are bound by their externally-imposed legal formulations even where such formulations are incomplete, incoherent and even contrary to soldiers' self-understandings. WALZER, *supra* note 12, at 15 (stating that the "moral reality of war is not fixed by actual activities of soldiers but by the opinions of mankind" and in particular the "activity of philosophers, lawyers, [and] publicists."). Whereas for proponents of the martial code an understanding of and appreciation for the experience of the combat soldier is essential to understanding the utility and limits of IHL, for legal absolutists such knowledge is, at best, superfluous.

subjective interpretations of variables the measurement of which is beyond the experiential realm of all but combat soldiers, are wholly incompatible with exceptions to the universal, positive commands constituting the IHL regime.[451] Failures to suppress violations are thus manifestations not of the inherent unsuitability of positive IHL to the practical needs of soldiers in combat but rather of the moral culpability of the perpetrators, and the solution lies in punishing the actors, enhancing penalties to support the deterrent value of the regime, and creating additional rules to strenghen the judicial model.[452] For obdurate absolutists, military justice is a proxy for military impunity,[453] and the system of courts-martial is an obscurant and idiosyncratic institution comprised of tendentious assemblages of cronies convened to afford legal shelter to guilty soldiers that will hold stubborn sway until swept aside by law. The next section illustrates how legal absolutism, expressed through the ICC, might adjudicate alleged violations of IHL arising from a United States covert operation designed to eliminate WMD in the custody of terrorists—a fictional scenario representative of future conflicts in the Age of Terrorism.[454]

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[451] *See* OSIEL, *supra* note 23, at 285 (stating that, in direct contrast to the martial code, which permits exceptions to its code of conduct yet imposes a much broader set of regulations consistent with its more holistic regulatory purpose, the approach to the prevention of violations of IHL advanced by legal absolutists is more "lenient in terms of the content of the rules themselves but strict in terms of its demand for their observance" and insists that acts that are prohibited are absolutely prohibited and may not be excused by claims such as necessity, ignorance or other defenses available under the system of courts-martial (quoting IAN CLARK, WAGING WAR 75 (1988)).

[452] The position that IHL compliance deficiencies are the result not of substantive inadequacy of the law itself but of deficiencies in enforcement that in turn are rooted in the lack of effective criminal sanctions is central to IHL legal absolutism. *See* Joyner, *supra* note 21, at 162 (stating the absolutist credo that "[w]ar crimes flourish in direct proportion to the . . . deficiency of law enforcement."); *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3 (1990) (referring to the model of human behavior that links legal compliance to the effectiveness of penalties as "instrumentalist").

[453] *See* King & Theofrastous, *supra* note 52, at 69 (arguing, in reference to My Lai, that the "*de minimis* punishment" courts-martial sometimes impose proof that courts-martial effectively immunize soldiers from responsibility for war crimes).

[454] *See* James B. Motley, *Coping with the Terrorist Threat: The U.S. Intelligence Dilemma*, *in* INTELLIGENCE AND INTELLIGENCE POLICY IN A DEMOCRATIC

2. Prosecutor v. Task Force Ryan

In 1998 Juma Namangani, age 34, an ethnic Uzbeki[455] and a former Red Army paratrooper and veteran of the Soviet War in Afghanistan, formed the Islamic Movement of Uzbekistan (IMU), an Islamic terrorist organization committed to the establishment of Islamic republic in Uzbekistan[456] and a "virtual partner" with al Qaeda.[457] Namangani, a born-again Muslim who traveled to Saudi Arabia in the early 1990s to steep in the Wahhabist sect of Islam,[458] declared *jihad* to remove the secular government of Uzbekistan and establish a pan-Central Asian Islamic republic. By 1999, IMU, its forces gathered in bases in Afghanistan and Tajikistan and its coffers bursting with funds from the intelligence agencies of Saudi Arabia and Iran, Islamic charities in Europe[459] and the trafficking of opium between Afghanistan and Europe,[460] was launching increasingly successful attacks against government targets in the Fergana Valley, a region on the frontier near

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SOCIETY 165 (Stephen J. Cimbala ed., 1987) (asserting that terrorism is the "characteristic form of warfare of this age").

[455] The Uzbeki people are a Central Asian nationality that traces their ancestry to Uzbek Khan, a grandson of Genghis Khan. AHMED RASHID, JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA 23 (2002).

[456] Uzbekistan, with the capital city in Tashkent, is a landlocked, arid, predominantly-Muslim nation slightly larger than California that is bordered by Afghanistan, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan. Prior to 1991, it was a constituent republic of the Soviet Union. Despite extensive natural gas and petroleum reserves and a high literacy rate, it is a very poor nation with a per capita GDP of only $2500, and, in addition to its natural resources, opium production is a major industry. Uzbekistan, with an overwhelmingly homogenous population of 25 million largely of Uzbeki ethnicity, is governed by an authoritarian, corrupt regime led by President Islam Karimov which has a poor record on human rights and democratization issues. *See* Central Intelligence Agency, The World Factbook 2002, Uzbekistan, *available at* http://www.cia.gov/cia/publications/factbook/geos/uz.html [hereinafter World Fact Book]. The secular Karimov regime has been repressive on religious issues, preventing the Muslim majority from engaging in the free expression of their faith. RASHID, *supra* note 455, at 85.

[457] RASHID, *supra* note 455, at 173.

[458] *Id.* at 136-50.

[459] *See id.* at 8, 137-50 (tracing IMU financing to Saudi and Iranian intelligence agencies and to Islamic charities in the West).

[460] *See id.* at 137-50 (detailing the sources of IMU finance, including trafficking of heroin and other opium products between Central Asia and Europe).

Kyrgyzstan and Tajikistan and the stronghold of indigenous Wahhabism.[461] In 2000, President Karimov, a major ally in the United States anti-Taliban coalition, requested and received assistance, and United States Special Forces based in Tashkent began to train the Uzbeki Army in counterterrorism. However, the power of the IMU increased apace, and by spring 2001, General Tommy Franks, head of the United States Central Command, commented on a visit that he "believe[d] it [wa]s possible for very small numbers of committed terrorists to bring great instability . . . to the people in the region."[462]

General Franks proved prescient when the United States campaign against al Qaeda[463] and the Taliban[464] regime commenced with heavy bombing of targets in northeastern Afghanistan on October 7, 2002. After Namangani, the commander of joint IMU-Taliban operations in that sector, was killed in battle his second in command, Tahir Yuldashev, withdrew IMU and al Qaeda forces in strength, slipped through the noose and crossed the border into the Fergana Valley, and, by late 2004, IMU-al Qaeda forces had defeated the Uzbeki Army in a series of battles.[465] Success bred converts, and in early 2005 IMU forces, bolstered by additional troops drawn from allied Islamic terrorist organizations,[466] captured Tashkent, executed President Karimov and proclaimed the Islamic Emirate of Uzbekistan.[467] Yuldashev, the Emir of Uzbekistan, moving swiftly to create a Wahabbist state, declared Uzbekistan bound by no legal obligations save those imposed by *Shari'ah* (Islamic law),[468] and soon the teaching of foreign languages, the failure of men to wear beards and the provision of co-educational academic and medical services became punishable by stoning and amputation.[469] Worse was to come when in summer 2005 United States human intelligence sources reported that an international gathering of terrorists in Tashkent had assembled to plan the "eviction of the United States from the Muslim world and the liberation of Jerusalem,"[470] and, on the fourth anniversary of September 11, 2001, members of al Qaeda launched simultaneous attacks upon U.S. and international targets across Central Asia, destroying the United States embassies in Tashkent, Astana, Kazakhstan and Turkmenistan as well as the offices of the Amoco Oil Company in Astana and Dushanbe, Tajikistan, the offices of the World Bank and the U.N. Development Program in Fergana City and the headquarters of the 10th Mountain Division at its base in Khanabad, Afghanistan. Among the more than 5000 people killed were the directors of the United States Central Intelligence Agency and the Federal Bureau of Investigation.

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[461] *Id.* at 8, 45.

[462] *Id.* at 192 (quoting Retired General Tommy Franks, United States Army, United States Central Command).

[463] Al Qaeda is a multi-national organization of several thousand armed terrorists established in the late 1980s to "unite all Muslims and to establish a government which follows the rule of the Caliphs" by overthrowing non-Islamic governments and expelling Westerners and non-Muslims from Islamic states. *See* Federation of American Scientists Intelligence Resource Program, *at* http://www.fas.org/irp/world/para/ladin (last visited June 6, 2004). It is commanded by the charismatic Usama bin Laden, the wealthy son of a Saudi businessman, who has ordered all Muslims to kill U.S. citizens—civilian or military—and their allies everywhere. Yassin El-Ayouty, *International Terrorism Under the Law*, 5 ILSA J. INT'L & COMP. L. 485, 487 (1999). Al Qaeda is responsible for a host of acts of international terrorism, most notoriously the attacks on the World Trade Center and the Pentagon on September 11, 2001, which killed more than 3000 innocents, mostly civilians. Prior to coalition attacks in October 2001, al Qaeda was based in Afghanistan, but it has now dispersed in small groups across Asia and the Middle East. *See* World Factbook, *supra* note 456, Afghanistan.

[464] The United States initially supported the Taliban to promote security for pipeline projects and end the drug trade but cut support in response to serial violations of the human rights of women and children in 1997. VINCENT IACOPINO, THE TALIBAN'S WAR ON WOMEN 35 (1998).

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[465] Events presented from July 2003 and forward are fictional.

[466] *See* Terrorism in the Middle East and South Asia: Hearing Before the Senate Subcomm. on Near E. and S. Asian Affairs, 106th Cong. (1999) (testimony of Ambassador Michael A. Sheehan, Coordinator of Counterterrorism, U.S. Dep't of State, *available at* http://www.fas.org/inp/Congress/1999_hr/99/02_sheehan_terrorism.htm. (testifying that by the late 1990s Uzbekistan had become a safe haven and a recruiting base for the Egyptian Islamic Jihad, Algerian Armed Islamic Front, Kashmiri separatists and other terrorist groups).

[467] *See* IACOPINO, *supra* note 464, at 27 (noting that the victorious Taliban renamed the country the "Islamic Emirate of Afghanistan").

[468] *See* U.S. Dep't of State, Afghanistan Report on Human Rights Practices for 1996 (Jan. 30, 1997), *available at* http://www.state.gov/www/global/human_rights/1996_hrp_report/afghanis.html (cited in Marjon E. Ghasemi, *International Human Rights and Women's Equality: Afghan Women Under Taliban Rule*, 8 S. CAL. REV. L. & WOMEN'S STUD. 445, 445 (1999)) (describing the same process instituted by the Taliban immediately subsequent to their seizure of power in Afghanistan in 1996).

[469] *See* IACOPINO, *supra* note 464, at 3 (describing the arbitrary detention, torture, disappearance and cruel punishment of thousands of Afghanis under the Taliban).

[470] In the summer of 2003, al Qaeda claimed to have completely reorganized following the devastating United States attacks on its bases in Afghanistan, and spokesman Thabet bin Qais is reported to have stated that al Qaeda is "way ahead of the Americans and its allies in the intelligence war," that American security agencies still are ignorant of the changes the leadership has made, and that an attack the size of the Sept. 11 attacks is being devised against the U.S. *See* Dana Priest & Dan Eggen, *U.S. Expects More Strikes by Al Qaeda*, WASH. POST, May 16, 2003, at A01.

The United States immediately declared a national emergency,[471] passed domestic legislation authorizing military action against those responsible[472] and dispatched investigatory teams to Central Asia. In the aftermath of what came to be known as "9/11 2" the CIA belatedly discovered that Usama bin Laden and al Qaeda had taken shelter in Uzbekistan,[473] and President Bush demanded that the Yuldashev regime either extradite a list of suspects, including Usama bin Laden,[474] or else accept responsibility for their actions on the theory of vicarious state responsibility.[475] Yuldashev, disclaiming any criminal association with bin Laden, refused to surrender any Muslim suspects without a determination of their guilt in an Islamic court.[476] Within a week, the Supreme Islamic Court of the Emirate of Uzbekistan "exonerated" bin Laden and other senior leaders of al Qaeda of all charges of terrorism.[477] Out-

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[471] The text of the declaration is as follows:

> Declaration of National Emergency by Reason of Certain Terrorist Attacks by the President of the United States of America, A Proclamation: A national emergency exists by reason of the terrorist attacks in Central Asia and the continuing and immediate threat of further attacks on the United States. NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, hereby declare that the national emergency has existed since September 11, 2004, and, pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.), I intend to utilize the following statutes: sections 123, 123a, 527, 2201(c), 12006, and 12302 of Title 10, United States Code, and sections 331, 359 and 367 of Title 14, United States Code. This proclamation immediately shall be published in the Federal Register or disseminated through the Emergency Federal Register and transmitted to the Congress. This proclamation is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of September, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-ninth. GEORGE W. BUSH

(Patterned after the Declaration of the same title issued on September 14th, 2001 in response to the attacks on September 11th).

[472] In a Joint Resolution dated September 12, 2004, Congress, recognizing in a series of "whereas" clauses the right to self-defense, the threat posed by terrorist attacks to the "national security" of the U.S. and the "inherent powers of the President to take action to deter and prevent acts of international terrorism" against United States interests, passed legislation authorizing "the use of all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist at-

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tacks that occurred on September 11, 2004, in order to prevent any future acts of terrorism against the United States." *See supra* note 80 and accompanying text. The Joint Resolution further authorized the President to "use United States Armed Forces against those responsible for the recent attacks launched against United States nationals, property, and interests in Central Asia" and provided that such authorization was consistent with the requirements of the War Powers Resolution. *Id.*

[473] The sheltering of members of other tribes is an ancient Central Asian tradition followed by contemporary terrorists of the region, and it was this tradition which in part provided the basis for the Taliban to provide sanctuary to Usama bin Laden. *See* Tim McGirk, *Pakistan Seizes a Suspect in the U.S. Embassy Bombings,* TIME, Aug. 31, 1998, at 34 (reporting that the Taliban reluctance to release bin Laden stemmed from a Central Asian tradition so absolutist that it mandates sheltering from their pursuers, "even your own worst enemy or a murderer.").

[474] Usama bin Laden, the mastermind, financier and spiritual leader of al Qaeda, has been in hiding for over a decade and has declared a jihad against all United States citizens and interests. *See* El-Ayouty, *supra* note 463, at 492 (noting issuance of a fatwa, or religious commandment, by bin Laden in 1996 calling for war of genocide against Americans).

[475] *See* Michael Lacey, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L. REV. 293, 305 (presenting the argument that states are responsible for the actions of terrorist groups they permit to operate within their borders on a theory of vicarious state responsibility).

[476] This is the precise position taken by the Taliban regime with respect to bin Laden and other members of al Qaeda upon the United States demand for their extradition to the United States in 1998. *See Taliban Willing to Discuss what to Do with Osama bin Laden*, AGENCE FR.-PRESSE, Aug. 29, 1998 (reporting an agreement reached with the Taliban to try members of al Qaeda in an Islamic court provided the United States provided credible evidence).

[477] *See Afghans Silence but Won't Expel bin Laden*, SUN SENTINEL (Ft. Lauderdale), Feb. 13, 1999, at 32A (reporting the acquittal of bin Laden in a Taliban court).

raged, the President dispatched several carrier battle groups to the Mediterranean and, at a White House news conference, declared that "countries like Uzbekistan must know that if they harbor terrorists they cannot complain if we bomb."[478] Late in 2005, the day after the United States announced the major enhancement of the capabilities of its special operations forces,[479] a joint United States-Israeli intelligence operation[480] determined that several Iraqi microbiological scientists who had escaped after the fall of the Saddam Hussein regime in April 2004 had surfaced only to recommence their work in Uzbekistan,[481] sparking fears that the Yuldashev regime was developing biological weapons.[482] The following week the

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[478] *See* Hearings of the Senate Foreign Relations Subcommittee on Near Eastern and South Asian Affairs, Fed. News Service, Oct. 8, 1998, at 1 (testimony of United States Ambassador to Afghanistan) (cited in Stephanie R. Nicolas, *Negotiating in the Shadow of Outlaws*, 9 J. TRANSNAT'L L. & POL'Y 385, 392 n.45 (2000)).

[479] The United States Special Operations Command (USSOCOM), headquarted at MacDill Air Force Base in Tampa, Florida, has been the recipient of greatly increased budgets since 2000, with much of the resources dedicated to procurement of troops and weapons systems for the War on Terror. *See* Shanker, *supra* note 108, at A10.

[480] Israeli collaboration with United States intelligence operations in Iraq was critical in unmasking Iraqi concealment of its WMD programs in the late 1990s. *See* Allison Van Lear, *Loud Talk About a Quiet Issue: The International Atomic Energy Agency's Struggle to Maintain the Confidentiality of Information Gained in Nuclear Facility Inspections*, 28 GA. J. INT'L & COMP. L. 349, 355-56 (2000) (detailing extensive U.S.-Israeli intelligence coordination in the context of the United Nations Special Commission (UNSCOM) inspections in Iraq).

[481] Despite coalition efforts to ascertain the whereabouts of and debrief Iraqi weapons scientists, many of the senior Iraqi weapons scientists are as yet unaccounted for. Upon the collapse of the Soviet Union, many Russian scientists who had been detailed to biological weapons programs dispersed to China, Syria, Iran and Egypt, ostensibly to resume such work in those states. *See* Adherence to and Compliance with Army Control Agreements, U.S. Dep't of State, 1997 Report, *available at* http://www.state.gov/www/global/arms/reports/ annual/comp97.html. It is not inconceivable that Iraqi weapons scientists might seek other employment opportunities in their field in states able and willing to pay for their services and shelter them from apprehension.

[482] Poisonous weapons, a subset of WMD, are organized into three categories: (1) biological weapons (BWs) (consisting of living organisms, whether bacteria or viruses, disseminated for ingestion by a target population to create an epidemic, which are capable of auto-reproduction), such as anthrax, cholera, ebola, plague and yellow fever; (2) toxins (consisting of harmful substances produced by living organisms but which are not themselves living organisms and are thus incapable

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of reproduction), such as botulin and staphylococcus; and (3) chemical agents (consisting of inorganic, harmful substances), such as mustard gas and chlorine. *See* James R. Ferguson, *Biological Weapons and U.S. Law*, 278 J. Am. Med. Assoc. 357, 359 (1997) (discussing various categories of infectious and toxic agents); Matthew S. Meselson, *Chemical and Biological Weapons*, Sci. Am., May 1970, at 303 (discussing taxonomy of poisonous weapons).

BWs, the first category of poisonous weapons, vary in lethality, incubation period and their capacity for diffusion. David R. Franz, *Clinical Recognition and Management of Patients Exposed to Biological Warfare Agents*, 278 J. Am. Med. Assoc. 399 (1997). They are typically delivered by bombs and other systems that cause the lethal organisms to disperse as aerosolized particles, although they can also be delivered by terrorists using less sophisticated means, including the use of crop-dusting aircraft, in the air circulation systems of large buildings, in food and water supplies and by mail. Jeffrey D. Simon, *Biological Terrorism: Preparing to Meet the Threat*, J. Am. Med. Assoc. 428, 429 (1997) (discussing methods of dissemination of BW by terrorists); Raymond A. Zilinskas, *Iraq's Biological Weapons: The Past as Future*, 278 J. Am. Med. Assoc. 418, 420 (1997) (listing traditional methods of delivery of BW). Even the most lethal agents are difficult to control due to the complexities in managing their wind dispersal patterns. John D. Steinbruner, *Biological Weapons: A Plague Upon All Houses*, 109 Foreign Pol'y 85, 87-88 (1997-98). As a consequence, many states have foresworn BWs and destroyed existing stockpiles and turned to other weapons systems for strategic defense. *See* Scott Keefer, *International Control of Biological Weapons*, 6 ILSA J. Int'l Comp. L. 107, 108-09 (1999) (discussing trend towards demilitarization in field of BWs since late 1960s).

However, despite their inherent unpredictability, BWs are potentially very effective weapons to terrorist organizations. BWs, the "poor man's atomic bomb," are tremendously lethal in small quantities and thus can be transported and distributed effectively without the use of significant manpower. *See* Robert P. Kadlec et al., *Biological Weapons Control: Prospects and Implications for the Future*, 278 J. Am. Med. Assoc. 351, 351 (1997) (discussing the aspects of BWs that render them especially suited to use by terrorists, including lethality and portability); DOD News Briefing, M2 Presswire, July 9, 1998, *available at* 1998 WL 14095268 ("Five pounds of anthrax, properly dispersed, would kill over 200,000 in Washington, D.C."); *see also Vaccine Improves Odds Against Anthrax*, Regulatory Intelligence Database, Apr. 6, 1998, *available at* 1998 WL 194056 ("When inhaled, an unvaccinated, unprotected person has about a one percent chance of surviving a concentrated anthrax exposure."). Moreover, as their effects are often not observed for days, the radius of lethality can expand to cover a wide target population as victims, unaware of their condition, move about, continuously infecting others. 1998 WL 194056. Further, BWs are relatively simple and cost-effective to produce, and they can be manufactured in otherwise innocuous-seeming facilities such as pharmaceutical laboratories, light industrial facilities and even in civilian residential infrastructure. *See* David G. Gray, *"Then the Dogs Died": The Fourth Amendment and Verification of the Chemical Weapons Convention*, 94 Colum. L. Rev. 567, 574 (1994) (discussing the relative ease of producing chemical weapons and BWs). Because BWs can be readily produced in these "dual-use" facilities (facilities that have a second or "dual" purpose other than their military character), it is difficult to detect their manufacture and easy to deny the same.

Uzbeki government official responsible for weapons programs defected while at a conference in London, corroborating CIA reports and providing details, including partial information about al Qaeda plans to deploy biological weapons (BWs) in reservoirs across the United States[483] The Director of Homeland Security,[484] in consultation with the Defense Threat Reduction Agency,[485] estimated that Uzbekistan was less than

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See Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden,* 24 YALE J. INT'L L. 559, 559-60 (1999) (discussing the ease with which any dual-purpose production facility can be readily converted from the manufacture of chemical weapons or BWs to the production of pharmaceutical drugs).

[483] *See* Burrus M. Carnahan, *Protecting Nuclear Facilities from Military Attack: Prospects After the Gulf War*, 86 AM. J. INT'L L. 524, 524 (1992) (indicating that a primary method of verification of human intelligence reports with regard to the existence of clandestine WMD programs has been defector reports); *see also* Vernon Loeb, *Iraqi Defector Says Saddam Was Near to Building A-Bomb*, WASH. POST, Nov. 5, 2000, at A2 (reporting that reports of the chief Iraqi nuclear scientist, Khidir Hamza, who defected to the U.S., were instrumental in establishing proof of the status of Iraqi efforts to obtain nuclear weapons).

[484] The Department of Homeland Security (DHS) was created on Oct. 8, 2001, to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. *See* The White House, the Office of Homeland Security, *at* http://www.whitehouse.gov/homeland/ (last visited Feb. 6, 2004).

[485] Over the past seven years, the United States perception of the threat posed by BWs has transformed dramatically. Whereas BWs were once conceived of as a weapon unlikely ever to be used by virtue of their possession solely by the Soviet Union and perhaps a handful of other states against which the deterrent threat posed by United States nuclear weapons was sufficient, the troubling diffusion of BWs has altered United States calculations. In 1996, Congress passed legislation in recognition of the fact that the United States lacked adequate plans and countermeasures to defeat the threat posed by the possession of BWs by terrorists and rogue states. *See* Defense Against Weapons of Mass Destruction Act of 1996, 50 U.S.C. §§ 2301-66 (1996) (DAWMDA). The Nunn-Lugar Amendment to DAWMDA included significant Congressional findings that supported establishment of a specialized agency tasked to meet this threat. *See* Nunn-Lugar Amendment 4349, S. 1745, 104th Cong., 2d Sess., 142 Cong. Rec. 57041 (June 26, 1996) (noting that no specific response unit existed for emergencies involving chemical or biological weapons). After President Clinton issued Executive Order 12,868 declaring a national emergency in response to the "unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" posed by the proliferation of WMD, Congress expressed the sense that the use of WMD was an "abhorrent" act in contravention of international law that "should trigger immediate and effective sanctions." *See* Chemical and Biological Weapons Threat Reduction Act of 1997, S. 495, 105th Cong. (1997) (finding further, throughout Title II, § 207(a), that the "threats posed by chemical and biological

ninety days from testing its arsenal[486] and ordered his staff to begin planning the declaration of martial law and the commandeering of vaccinations.[487]

This revelation did not catch the United States completely

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weapons to United States Armed Forces . . . deployed in regions of concern will continue to grow . . . ," that "the use of chemical and biological weapons will be a likely condition of future conflicts in regions of concern" and "the United States Armed Forces should make countering the use of chemical and biological weapons an organizing principle for United States defense strategy and for the development of force structure, doctrine, planning, training, and exercising policies of the United States Armed Forces."). Despite these legislative and executive statements of policy, by 1998 little concrete progress had been made to enhance preparedness against an attack against the United States using BWs. *See* Paul Richter, *U.S. Lags in Biological Warfare Protection Threat Said to Be on the Rise*, TIMES-PICAYUNE (New Orleans), Dec. 27, 1997, at A6 (stating that "the United States is poorly prepared to defend its armed forces from the rising threat of germ warfare attack and lags even more in protecting Americans at home.").

In March 1998, however, a then-secret executive branch conference revealed the magnitude of United States unpreparedness, and, in October 1998, the Department of Defense merged several agencies to create the Defense Threat Reduction Agency with the mission to address the problem of growing weapons proliferation and the threat from WMD in the possession of terrorist groups and rogue nations. Dep't of Defense, *Establishment of the Defense Threat Reduction Agency*, Research Intelligence Database, Oct. 1, 1998, *available at* http://www.defenselink.mil/news/oct1998/b10011998_bt508-98.htm) (last updated Jan. 14, 2003) (transcript of the Department of Defense announcement on the establishment of the Defense Threat Reduction Agency). According to then-Secretary of Defense William Cohen, "Today's harsh reality is too powerful to ignore: at least 25 countries have, or are in the process of developing, nuclear, biological or chemical weapons and the means to deliver them . . . We must confront these threats in places like Baghdad before they come to our shores." *Id.* The Director of DRTA, upon assuming his post, warned that "[t]he deterrent capability of the United States is still very effective against national states. [But] [i]t's not so clear that it has the same effect on transnational organizations." *New U.S. Agency to Deal with Weapons of Mass Destruction Threat*, AGENCE FR.-PRESSE, Oct. 2, 1998, *available at* 1998 WL 16611007 (cited in Matthew Linkie, *The Defense Threat Reduction Agency: A Note on the United States' Approach to the Threat of Chemical and Biological Warfare*, 16 J. CONTEMP. H.L. & POL'Y 531, 532 n.8 (2000)).

[486] *See* Lacey, *supra* note 475, at 293 (positing, in a fictional scenario, a United States strike to eliminate the weapons program of a terrorist group on the ground that the terrorist group was only three months removed from developing operational nuclear weapons).

[487] In the event of a terrorist attack with BWs upon the U.S., the probable response of the United States government would include the declaration of martial law, the closure of federal and State borders and the commandeering of vaccines. *Martial Law Possible in Biological Terror Scenario*, ASSOCIATED PRESS, Aug. 4, 2001; *see also* Telephone Interview with Cliff Ong, State of Indiana Director of Counterterrorism and Homeland Security (August 16, 2003).

by surprise because although Uzbekistan ratified the Biological Weapons Convention (BWC) in 1996,[488] this was not the first time an avowed member of a non-proliferation treaty had violated the terms of its membership by producing the prohibited weapons in question,[489] and the notion that a small and impoverished state could inflict massive devastation upon the United States had been on the minds of policymakers for over a decade.[490] However, the BWC did not of its own effect constitute prior authorization of the use of military force to ensure compliance,[491] and the 2001 collapse of the BWC Protocol,[492] which would have appended enforcement mechanisms to the treaty, left the United States in search of multilateral enforcement mechanisms to secure Uzbeki compliance with the BWC. Uzbekistan categorically denied possession of WMD, and United States pressure to permit inspection and verification led the

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[488] See Convention on the Prohibition of Bacteriological (Biological) and Toxin Weapons, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter BWC] (prohibiting the production and stockpiling of BWs). The earliest positive legal prohibition on BWs was found in the Lieber Code, which prohibited the use of poisonous weapons. *See* Lieber Code, *supra* note 12, art. 16. However, current prohibitions and regulations derive from the instruments of IHL governing chemical weapons, which preceded BWs to the arsenals of belligerents. Hague IV, *supra* note 96, art. 23(a), specifically forbade the employment of poisoned weapons by parties to that convention, and the use of "bacteriological methods of warfare" (although not the development of BWs) was prohibited after WWI. *See* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, U.S.-Fr., 26 U.S.T. 571. The BWC, which entered into force in 1972, is currently the primary legal instrument governing BWs. It prohibits the development, stockpiling and use of biological weapons, and it has been ratified by almost 150 states. For a list of parties to the BWC, see http://disarmament.un.org/TreatyStatus.nsf (last visited Feb. 19, 2004).

[489] *See* David Sloss, *It's Not Broken, So Don't Fix It: The International Atomic Energy Safeguards System and the Nuclear Nonproliferation Treaty*, 35 VA. J. INT'L L. 841, 842 (noting that Iraq during the 1970s and 1980s was able to conduct a clandestine nuclear weapons program even while a non-nuclear weapon state-member of the Nuclear Nonproliferation Treaty).

[490] *See* Michael Mandelbaum, *Lessons of the Next Nuclear War*, FOREIGN AFF. 22 (Mar.-Apr. 1995) ("It doesn't take a superpower to pose a nuclear threat. A small, poor country with a few [WMD] and the means to deliver them could wreak terrible damage on the United States.").

[491] *See* Fred C. Ikle, *The New Germ Warfare Treaty is a Fraud*, WALL ST. J., July 27, 2001 at A8 (reporting the frustration of the Bush Administration with the lack of provisions to enforce the BWC). The lack of enforcement provisions is characteristic of conventions designed to prevent the proliferation and use of WMD. *See* Scott Silliman, *Foreword: Contemporary Issues in Controlling Weapons of Mass Destruction*, 8 DUKE J. COMP. & INT'L L. 1, 2 (1997) (noting that IHL instruments regulating WMD, including the BWC, lack enforcement mechanisms); *see also* Linkie, *supra* note 485, at 553-54 (describing more generally the shortcomings of international law in guiding states seeking to control the threat of

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WMD due to a lack of explicit enforcement provisions in relevant conventions and the legal and political difficulties in drafting and applying military sanctions to violators). Although the United States contemplated invading Iraq in 1997 to eliminate WMD in possession of the Hussein government and did in fact do so in 2003, the legal authority upon which it relied was not any enforcement provision of any IHL instrument but rather relevant Security Council resolutions. *See* Thomas C. Wingfield, *The Chemical Weapons Convention and the Military Commander: Protecting Very Large Secrets in a Transparent Era*, 162 MIL. L. REV. 180, 180 (1999) (discussing legal sources of justification for United States plans to eradicate Iraqi WMD in the mid-1990s).

[492] Ironically, although the United States was at the forefront of efforts to create a Protocol that would create mechanisms to monitor and enforce state compliance with the BWC, it was American objections to verification and enforcement mechanisms proposed at the Fourth Review Conference of the BWC that doomed the long-anticipated Protocol. For the U.S., a proposal that would have obligated states-parties to declare whether they possessed BW defense programs and, if so, to submit to random site visits that would include not only defense installations but such potentially dual-use facilities as pharmaceutical plants and medical research facilities was "incurably flawed" on the grounds that, *inter alia*, it would threaten national security and reveal pharmaceutical industrial secrets without contributing to the enforcement of the BWC. *See* Ambassador Donald Mahley, United States Special Negotiator for Chemical and Biological Arms Control Issues, Statement by the United States to the Ad Hoc Group of Biological Weapons Convention States Parties, Geneva, Switz. (July 25, 2001), *available at* http://www.state.gov/t/ac/rls/rm/2001/5497.htm (last visited Feb. 19, 2004) (presenting grounds upon which the Bush Administration rejected the proposed BWC Protocol); *see also* Alexander Higgins, *U.S. Rejects Anti-Germ Warfare Accord*, DESERT NEWS (Salt Lake City), July 25, 2001, at A04 ("In our assessment, the draft protocol would put national security and confidential business information at risk" (quoting Ambassador Mahley)). Although a majority of the fifty-six states in attendance favored adopting the Protocol, an instrument that represented the fruits of seven years' negotiation, talks were suspended following the United States withdrawal from the Review Conference. *Germ Warfare Talks Suspended; Democrats Attack Bush's Foreign Policy*, HERALD TRIBUNE, Aug. 4, 2001. Many commentators expressed outrage at the United States position; U.N. Secretary General Kofi Annan stated that the United States is "practically standing alone in opposition to agreements that were broadly reached by just about everyone else" and urged the United States to "close ranks with the rest of the international community." Steven Thomma & Warren P. Strobel, *Bush's Unilateral Germ-Warfare Policy Gets Mixed Results*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, July 26, 2001. To date, talks have not resumed, and the BWC continues to lack any enforcement provisions.

U.N. Secretary General to dispatch a delegation at the invitation of Uzbekistan. However, Yuldashev ejected the U.N. weapons inspectors after three days, declaring that they were in fact United States intelligence officers,[493] and further requests to inspect were met with demands for financial assistance as a precondition. When the United States and Britain sought to have the problem defined in the Security Council as a threat to international peace and security[494] and to have Yuldashev declared criminally responsible for his breach of the BWC,[495] critics of the United States, domestic as well as foreign, demanded proof which the United States, unwilling to jeopardize the sources and methods whereby it had developed its information and unwilling to spend months making such a demonstration, was hesitant to provide.[496] A Russian-Chinese-French

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[493] When UNSCOM, the U.N. team of weapons inspectors dispatched by the Secretary-General to locate Iraqi WMD, began to make progress in late 1998, Iraq responded by ejecting UNSCOM and declaring that some of its members were espionage agents of the United States Allison Van Lear, *Loud Talk About a Quiet Issue: The International Atomic Energy Agency's Struggle to Maintain the Confidentiality of Information Gained in Nuclear Facility Inspections*, 28 GA. J. INT'L & COMP. L. 349, 354-55 (2000). Although it is unclear whether there was any substance to the allegation, it provided justification and political cover for an action that might well have otherwise precipitated a swift, decisive military response to force Iraq to submit to inspection. *Id.* at 356-59.

[494] When the U.N. Security Council makes the finding that a situation constitutes a "threat to international peace and security" under the Charter of the United Nations, the Security Council is empowered to take any of the following escalating measures in response: create an investigative and advisory commission, impose an economic embargo on the offending state or ultimately authorize the use of force against the offender. *See* U.N. Charter arts. 36-43. However, even where a threat to international peace and security is apparent, a Security Council response depends upon the political will of its members and cannot be presumed. *See* Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724, 728 (noting that despite the ongoing threat to peace and security posed by Iraqi refusal to permit weapons inspections as required by UNSCR 687, the Secretary-General of the U.N., Kofi Annan, insisted that "some sort of consultations with other members" were required before enforcement action could be undertaken).

[495] The issuance of a U.N. Security Council resolution under Chapter VII of the U.N. Charter, indicating international condemnation of a particular individual and expressing the intent to hold him criminally responsible for his actions, is effectively an international "arrest warrant," and one such warrant was the catalyst for the U.S.-led mission to capture Mohammed Farah Aideed, the warlord responsible for the conflict in Somalia in October 1993. *See* S.C. Res. 865, U.N. SCOR, 3280th Mtg., U.N. Doc. S/RES/865 (1993) (condemning attacks on U.N. personnel and "reaffirm[ing] that those who have committed or have ordered the commission of such criminal acts will be held individually responsible for them"). Although refusal to permit international inspections is not in and of itself a criminal act under IHL, it can be considered evidence of potential violations of legal obligations. *See* Robert A. Bailey, *Why Do States Violate the Law of War?: A*

Comparison of Iraqi Violations in Two Gulf Wars, 27 SYRACUSE J. INT'L L. & COM. 103, 122 (2000) (making this assertion).

[496] Some commentators insist that states seeking waiver of the Charter-based general prohibition of the use of force must submit to an international "jurying" process whereby the evidence adduced by the state seeking a variance is "tried" with the onus on the requesting state to prove its purity of motives, the proportionality of the proposed use of force and the severity of the threat. *See* Thomas M. Franck, *The Use of Force in International Law*, 11 TUL. J. INT'L & COMP. L. 7, 15-17 (2003). However, considerations of bureaucratic inefficiency, opposing political interests, and the absence of effective transnational procedures for protecting shared intelligence sources and methods militate against submission to an international jury. To wit, the production of proof that a state is in possession of prohibited weapons is a time-consuming process made all the more so by the machinery of the U.N. system. *See Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium*, MICH. J. INT'L L. 655, 716 (discussing bureaucratic inefficiencies and the glacial pace of the U.N. system); Michael A. Lysobey, *How Iraq Maintained its Weapons of Mass Destruction Programs: An Analysis of the Disarmament of Iraq and the Legal Enforcement Options of the United Nations Security Council in 1997-1998*, 5 UCLA INT'L L. & FOREIGN AFF. 135, 152-53 (2000) (describing determination of material breaches of peace and security as "plodding" and subject to the "whim of whatever immediate political and economic factors are motivating the Council"). Moreover, proof requires the sharing of intelligence, something states are loathe to do with all but their closest allies for fear that revelation of the evidence will permit deductions as to how the evidence was acquired (methods) and by whom (sources) as well as the possibility that reviewers sympathetic to the target might share the intelligence with the target. Sara N. Scheideman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 260-61 (2000); *see also* Thomas Graham, *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L., 1, 8 (2003) (conceding that it is very unrealistic to suggest that states be forced to disgorge the intelligence upon which they rely in taking measures to preempt attack); Linkie, *supra* note 485, at 573 (explaining that the United States cannot reveal all its evidence without compromising the human intelligence sources, who may be placed within terrorist organizations or supply networks, or disclosing its methods of interception and decryption of enemy communications); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 567 (1999) ("In the midst of a . . . war, a country defending its territory and its nationals will rarely be able to disclose intelligence sources in a public forum."). Moreover, even after reviewing the evidence, states unwilling on other grounds to approve a proposed military operation to sanction the state in violation are far less likely to concede that the proferred evidence is probative of the existence of the weapons in possession of

bloc prevented the issue from coming to a vote,[497] and with Iraq and Iran sitting as heads of the U.N. Disarmament Committee[498] and no further assistance forthcoming in the U.N. system, the United States shifted diplomatic gears and attempted to assemble a "coalition of the willing" to compel Uzbeki compliance, commencing with NATO and United States-allied Islamic states.[499] However, in the absence of a Security Council resolution authorizing force, only Britain, Australia, Italy, Poland and Croatia, states with whom the United States had shared all or some of its sensitive intelligence, committed to a U.S.-led coalition.[500] In a press confer-

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the accused state. *Id.* Despite its post-hoc production of physical evidence that the Sudanese Al Shifa facility it destroyed had been producing chemical precursors for VX nerve gas, the United States continued to face claims, contrary to the evidence, that the facility was engaged in the benign purpose of producing animal feed and that the United States strike was an unlawful reprisal. Linkie, *supra* note 485, at 569. For a discussion of this case, see Tim Weiner, *Pentagon and C.I.A. Defend Sudan Missile Attack*, N.Y. TIMES, Sept. 2, 1998, at A5; Serge Schmemann, *U.S. Fury on Two Continents: Pros and Cons; How Can Terror Best Be Combatted*, N.Y. TIMES, Aug. 21, 1998, at A11.

[497] Russian, Chinese and French opposition to military action to enforce relevant Security Council Resolutions requiring Iraq to disarm prevented the use of U.N. collective security; thus, upon the Iraqi suspension of UNSCOM activity in August 1998, the U.N., rather than impose the "unavoidable and explicit" military consequences promised, was left in the position of offering Iraq financial inducements to comply. *See generally* Lysobey, *supra* note 496, at 103 (discussing the failure of collective security and enforcement of Security Council resolutions in the case of Iraq).

[498] Ironically, Iraq and Iran—states which have been sanctioned for the use and possession of WMD and which are both suspected of currently possessing WMD—were co-chairs of the U.N. Conference on Disarmament, a U.N. agency responsible for monitoring compliance with nonproliferation treaties from January through June 2003, during which time Iraq was in material breach of numerous U.N. Security Council resolutions requiring its disarmament.

[499] *See* El-Ayouty, *supra* note 463, at 496-97 (recommending that the United States create a pan-Islamic military force to acquire both the military strength, intelligence cooperation and political legitimacy necessary to defeat Islamic terrorists).

[500] The legal justifications for the use of force against Iraq in the period between the ceasefire in March 1991 and the overthrow of the Hussein regime in April 2003 (Second Gulf War) were twofold: (1) U.N. Security Council Resolution 687 of April 3, 1991, S.C. Res. 687, U.N. Doc. S/R65/687 (1991), expressly linked the ceasefire ending the First Gulf War with "unconditional . . . acceptance" of the elimination of WMD and verification by UNSCOM, and (2) the continued Iraqi violation of the terms of the ceasefire by virtue of the continued possession

ence denouncing NATO and Security Council inaction, the President of the United States warned that "any country who would threaten . . . our people with . . . biological weapons . . . [will] be met with a devastating response that would be quite swift and overwhelming."[501]

On January 3, 2006, electronic intercepts of telephone and radio communications between senior members of al Qaeda and Uzbeki officials corroborated the reports of United States agents within the Uzbeki opposition that the Namangani regime and al Qaeda were collaborating on the production and planned use of BWs,[502] and the next day a Special National Intelligence Estimate[503] presented by the Director of the Central Intelligence Agency (DCIA) to the President concluded that the Government of Uzbekistan, in consortium with al Qaeda,

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of WMD, which violation constitutes an ongoing threat to peace and security, the restoration of which U.N. members were authorized to effect. *See* Wedgwood, *supra* note 494, at 724 (1998) (discussing legal justifications for coalition operations against Iraq). In other words, everything hinged upon S.C. Res. 687. In the absence of Security Council authorization, military operations against Iraq could have been justified under the Charter framework only by a claim of self-defense, which would be more difficult to support on the ground that the evidence necessary would have been proof of the existence of Iraqi WMD coupled with an Iraqi intent to use those weapons. It is precisely this evidence that has yet to surface even after several months occupation of Iraq, and it is precisely this sort of evidence that, in the scenario in this Article, the United States is unwilling to publicly disclose.

[501] *See Frontline: Plague War* (interview with William S. Cohen, U.S. Sec'y of Def.) (Pub. Broad. Serv., Oct. 1998), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/plague/interviews/Cohen/html [hereinafter *Frontline*] (quoting the former Secretary of Defense with respect to responses to the use of WMD against the U.S.).

[502] The National Security Agency (NSA), the federal agency charged with the protection of United States government communications and the interception of foreign communications, or SIGINT, intercepted and decoded exchanges between the Qadhaffi regime and the Libyan People's Bureau in East Berlin, including an order from Libya to carry out a terrorist attack on United States military personnel, a response that the attack would occur the next day, a confirmation of the attack and assurance that the attack was untraceable. *See* Bob Woodward & Patrick E. Tyler, *Libyan Cables Intercepted and Decoded*, WASH. POST, Apr. 15, 1986, at A1. NSA monitors the communications of enemy states and terrorist organizations for the purpose of countering hostile intentions and acts. *See generally* http://www.nsa.gov (last visited Feb. 19, 2004).

[503] A Special National Intelligence Estimate (SNIE) is a judgmental assessment based on a consensus of the intelligence community as to a time urgent and specific problem that presents a grave threat to national security.

was producing and stockpiling weapons-grade anthrax and ebola in an ancient mosque in a densely populated urban neighborhood[504] in Namangan (a city of 430,000 in the northern Fergana Valley).[505] Also, Usama bin Laden had ordered a wave of BW attacks on major United States cities, and stockpiled weapons were to be moved to al Qaeda cells in the United States within forty-eight hours.[506] After a brief discussion with the Chairman of the Joint Chiefs of Staff (CJCS) and the National Security Adviser, the President, concerned about the repercussions of failure and the possibility that members of Congress might delay and even refuse his proposals, rejected overt military options[507] and ordered CJCS to present plans to conduct a covert operation with the primary mission[508] the destruction of the BWs and the secondary objective the capture or elimination of bin Laden if found at or near the target.[509]

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[504] The siting of military facilities within civilian areas makes it inordinately difficult for attacking forces to preserve the principle of distinction and separate civilians from military objectives. *See supra* note 45 and accompanying text (discussing principle of distinction). The objective of actors who situate such facilities is to effectively remove legitimate military objectives from the list of those targets an adversary committed to preservation of innocent life will choose to attack. For a discussion of this strategy, see infra notes 572-74.

[505] Electronic interception of communications between officials at the Al Shifa factory and Iraqi weapons scientists corroborated the role of Al Shifa in the production and transshipment of chemical weapons, and similar intercepts revealed the possibility that a facility in a populated suburb of Khartoum, Sudan, was being established as a production center for WMD; President Clinton later ordered the destruction of both facilities. Linkie, *supra* note 485, at 571. On the strength of this intelligence, President Clinton ordered the destruction of both facilities. *See* President William Jefferson Clinton, Remarks on Departure for Washington, D.C., from Martha's Vineyard, Massachusetts, 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998). The production and storage of WMD in densely populated civilian centers, a strategy designed to safeguard prohibited weapons from preemptive attack, is of particular concern in IHL. *See infra* note 622.

[506] A congressional investigation suggests up to 70,000 members trained by al Qaeda are in the United States prepared to initiate terrorist missions on command. David Pace, *Al Qaida Trained 120,000 Terrorists*, ASSOCIATED PRESS, July 14, 2003.

[507] While an overt military strike against a "rogue state . . . producing biological weapons at a clandestine factory which are to be used in a terrorist action against the United States" would, particularly if approved by the U.N. Security Council, satisfy the requirements of IHL with respect to the right under *jus ad bellum* to undertake military action and to conduct operations openly, particularly if preceded by "elaborate discussions in the Security Council with a view to agreeing on some coordinated response or authorization for a unilateral action . . . [and] would alert the rogue state, allowing it the time to take evasive action and increasing the likelihood and extent of casualties which would be suffered by the state contemplating the preemptive action." Reisman, *supra* note 108, at 17; *see*

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also Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 284, 303-04 (1992) (stating that in the case of potential attack by WMD, the need to act with alacrity and the languid pace of diplomatic negotiations may dictate that covert operations, even where unauthorized by the U.N., are preferrable to all other policy options, especially large-scale overt operations that increase the likelihood of civilian casualties). To maintain the secrecy essential to limiting casualties and to mission success, covert operations are preferred in such circumstances. *See* Wedgwood, *supra* note 496, at 567 (stating that the political advantage of submitting military operational plans to multilateral bodies such as the U.N. for approval is more than outweighed by the compromise of secrecy). Moreover, covert operations are perhaps less likely to be perceived by other states, if their existence ever becomes publicly known and acknowledged, as the sort of serious "assaults on the international order" that unauthorized overt military interventions, which tend to be undertaken on a far broader scale and for a much more extended duration and with far greater effects, are often claimed to constitute. *See* Johnson, *supra*, at 284-85 (explaining that covert operations tend to be of more limited scope, intensity, duration and discoverability than overt operations and are consequently less likely to arouse hostile scrutiny). Covert operations can also confer domestic political benefits: they need reduce risks, minimize losses in lives and treasure and are less likely to be revealed in the event of their failure, thus creating less domestic political liability than overt military operations, and they "give Presidents [who need not report them to Congress until after the fact] freedom from . . . difficult and annoying democratic constraints." Goodman, *supra* note 107, at 83. Thus, even if overt options might generally be more defensible, legally and politically, than covert operations, and even as a "more honorable option," there are circumstances where covert operations are preferred as policy options and legal and political arguments in support of the choice to operate covertly. Johnson, *supra*, at 305.

[508] A "mission" is "a duty assigned to an individual or unit" and "[t]he who, what, when, where and why that must be accomplished." U.S. DEP'T OF ARMY, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND GRAPHICS 1-201-203 (Sept. 30, 1997) [hereinafter FM 101-5-1].

[509] As a matter of international law, most commentators conclude that the policy of killing terrorist leaders, whether labeled assassination or simply an act of anticipatory self-defense, does not contravene convention or custom. *See* J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C.L. REV. 1069, 1070 (2002) (arguing that although customary IHL prohibits assassination of the civilian political leadership of states, it does not prohibit the killing of terrorists in self-defense under the doctrine of anticipatory self-defense); Louis R. Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 29-33 (1994) (same). Domestic law is somewhat more restrictive: Executive Order No. 12,333, promulgated by President Ronald Reagan, provides that "[n]o person employed by or acting on behalf of the [United States] shall engage in, or conspire to engage in, assassination." Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981). However, assassination may

The plan provided that the neither the participation of United States Armed Forces nor responsibility for the results was to be attributed to the United States until the President authorized such disclosure. The proposed rules of engagement (ROEs)[510]

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well "offer the best available remedy" in combating terrorism. Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMP. INT'L & COMP. L.J. 231, 249 (1991); *see also Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 229 (discussing utility of a policy of assassination of terrorists). Moreover, precisely what is meant by "assassination" is unclear, as EO 12,333 does not provide any insight into the meaning of, or the limitations on, assassination. W. Hays Parks, *Memorandum of Law: Executive Order 12,333 and Assassination*, ARMY LAW, Dec. 1999, at 4, 4, 7 (contending that the fact that the United States has continued post-EO 12,333 to engage in "the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to United States citizens or United States national security" suggests that the order is meant to have limited applicability); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 119 (1989) (arguing that the killing of terrorists are lawful acts undertaken in self defense and not assassinations, which term implies killing civilian political leaders for political rather than military purposes); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 145 (1991) 615, 635 (1992) (stating that the definitional ambiguity attached to the term "assassination" allows for a flexible approach that "leav[es] potential adversaries unsure as to exactly what action the United States might be prepared to take if sufficiently provoked"). Accordingly, several presidents have claimed the right to assassinate leaders and members of terrorist organizations and have issued policy guidance to the Department of Defense to this effect. *See* Alan Einisman, *Ineffectiveness at Its Best: Fighting Terrorism with Economic Sanctions*, 9 MINN. J. GLOBAL TRADE 299, 323 (2000) (alteration in original) (citing United States Army sources); Paul Richter, *Clinton Administration Reserves Right to Assassinate Terrorists*, MINN. STAR TRIB., Oct. 30, 1998, at A23. Consequently, the United States Army maintains that "[t]he clandestine, low visibility, or overt use of force against legitimate targets in time of war, or against similar targets in time of peace, where such individuals or groups pose an immediate threat . . . does not constitute assassination."; David E. Sanger, *A Nation Challenged: The President; Bin Laden is Wanted in Attacks, "Dead or Alive," President Says*, N.Y. TIMES, Sept. 18, 2001, at A1 (quoting President Bush in speech to Department of Defense officials on Sept. 17, 2001 as granting authority to the Armed Forces to kill, rather than capture, bin Laden).

[510] "Rules of engagement," or "ROEs," are statements of the means and methods by which the military chain of command authorizes subordinates to employ military force against specific targets and limits the degree of permissible force. F.M. Lorenz, *Law and Anarchy in Somalia*, 23 PARAMETERS 27, 29 (1993-94); *see also* DEP'T OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUBLICATION 1-02 (Apr. 12, 2001), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf [hereinafter DOD DICTIONARY] (defining ROEs as

drafted by the Office of the Staff Judge Advocate, Task Force Ryan,[511] provided that (1) temporary detention of noncombatants was authorized for security reasons or in self-defense, but personnel were advised that enemy combatants were unlikely to be uniformed or to grant quarter; (2) known or suspected terrorists were to be eliminated if capture was not feasible as inadequate lift capacity was available to evacuate significant numbers of enemy POWs and the successful completion of the mission precluded diversion of resources; and (3) best efforts

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"[d]irectives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."). ROEs are drafted, disseminated and interpreted by JAG officers in collaboration with combat commanders and their staffs. Standard ROEs, which conventional soldiers carry into battle on printed cards, direct soldiers to engage armed civilians only in self-defense, to arrange the evacuation of civilians prior to attack where possible, to obtain approval from proper command authority prior to the use of certain weapons systems and to use only that degree of force necessary and proportional to the threat. John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 53-54 (1991); *see also* Mark S. Martins, *Deadly Force is Authorized but also Trained*, ARMY LAW., Sept.-Oct. 2001, 1, 6 (explaining that ROEs, regardless of their specific provisions, are interpreted to permit soldiers to use the degree of force "which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property."). ROEs do not preclude the use of force in self-defense; on the contrary, standing ROEs require members of the Armed Forces to use whatever force is necessary to accomplish what is known as "force protection". *See* DOD DICTIONARY, *supra* (requiring members of the Armed Forces to participate in force protection, defined as "[a]ctions taken to prevent or mitigate hostile actions against Department of Defense personnel (to include family members), resources, facilities, and critical information"). Moreover, soldiers are required to remain alert and responsive to changes in their mission and threat dictated by events, and ROEs are to be interpreted in light of these variables. Martins, *supra* note 28, at 5. Overly restrictive ROEs can "handicap and endanger United States forces, especially ground troops." Martins, *supra*, at 1. Thus, although ROEs are by nature restrictive regulations that limit the legal use of force as a matter of domestic law, ROEs are guidelines, rather than categorical prohibitions, and the interpretation of decisions soldiers make while operating under the restraint of ROEs are "viewed from the perspective of the man on the scene—who may often be forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving—and without the advantage of 20/20 hindsight.'" *Id.* at 5 (citing Graham v. Connor, 490 U.S. 386, 396-97 (1989)).

[511] A JAG officer is assigned to draft a classified Legal Annex to each military operation clarifying relevant IHL issues and providing instruction as to compliance. Bulman, *supra* note 437, at 165.

were to be used to prevent civilian casualties and destruction of civilian property without compromising the requirements of force protection.

Within hours, the President, in an operations order limiting civilian access to the National Security Adviser and DCIA,[512] approved a CJCS plan, Operation Jeremiah,[513] calling for a Special Forces assault force to infiltrate Uzbekistan, proceed to and seize the mosque and destroy the weapons with execution to commence within eighteen hours. Although the President instructed his staff to "do what needs to be done and worry about the legal niceties later,"[514] the White House Office of Legal Counsel drafted a Memorandum[515] outlining relevant legal authority[516] and a finding in support of the operation:[517]

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[512] The decision to restrict access to aspects of a military operational plan is consistent with applicable federal law and is necessary in order to preserve operational security. *See* Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in scattered sections of Title 10 authorizing classification of operational plans and restricting access of cabinet officials).

[513] *See Jeremiah* 21:4-6 ("Thus saith the LORD God of Israel; behold, I will turn back the weapons of war that *are* in your hands, wherewith ye fight against the king of Babylon, and *against* the Chaldeans, which besiege you without the walls, and I will assemble them into the midst of this city. And I myself will fight against you with an outstretched hand and with a strong arm, even in anger, and in fury, and in great wrath. And I will smite the inhabitants of this city, both man and beast: they shall die of a great pestilence.").

[514] *ABA Panel: Bioterrorism Attack Would Squash Personal Freedoms; 'What Needs to be Done': Border Closures and Mass Quarantines Would Be Likely Responses*, TELEGRAPH HERALD (Dubuque, Iowa), Aug. 5, 2001, at A4 (quoting Suzanne Spaulding, former attorney with the Central Intelligence Agency, on the legal protocol that would in reality be pursued by executive branch officials responding to a terrorist attack with BWs against the U.S.).

[515] For an example of a memorandum of law providing the President with a legal opinion as to the authority of the President to commit United States Armed Forces to engage in operations, see Memorandum Opinion by the Attorney General of the Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 13 Op. O.L.C. 8 (1992).

[516] Among the sources of legal authority cited by the White House Counsel in support of the covert action against Uzbekistan was a 1996 statute in which Congress found that "the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 324(4), 110 Stat. 1255 (codified at 22 U.S.C.A. § 2377).

> I, President George W. Bush, President of the United States of America, find that the grave acts of violence committed by foreign terrorists against United States nationals and interests, coupled with the possession of weapons of mass destruction and the intent to use these weapons against the United States, constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and I hereby authorize covert action by the Armed Forces of the United States to eliminate this threat.

The next evening—a moonless night—twenty-four United States Army Special Forces[518] soldiers of the 3rd Special Forces Group, headquarted at the JFK Special Warfare Center in Fort Bragg, North Carolina, but already prepositioned in Afghanistan[519] and trained for Operation Jeremiah,[520] crossed the border and parachuted into the arid Alay Mountains in Uzbekistan from MH-53J Pave Low helicopters flown by the 160th Special Operations Aviation Regiment. Upon landing, the two Alpha teams accessed prepositioned gear and weapons, mounted camouflaged dune buggies and sped north down the mountains and through the Fergana Valley, bypassing areas of human settlement toward Namangan. The heavily-laden teams disembarked on the city outskirts, buried unneeded equipment in a cultivated field, established communications, received confirmation of their mission and proceeded on foot the final several kilometers toward the Central Mosque. As the teams maneuvered through the twisted streets, several unarmed men

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[517] Under federal law, the President may not authorize covert operations unless he determines that "such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security . . . ." Intelligence Authorization Act, Pub. L. No. 102-88, 105 Stat. 441, at § 503(a) (1991) (requiring that such a finding be in writing unless time does not permit). However, although special operations forces are frequently used in execution of covert operation; this rests on a legal distinction that the role of the United States in covert operations is to remain unacknowledged. Nonetheless, because a proposed amendment to the Intelligence Authorization Act of 1991, known as the "Cambone Understanding" after the sponsor, would redefine all special operations missions as covert operations requiring a Presidential finding as a condition precedent to their deployment, this scenario incorporates such a finding. Bill Gertz, *Congress to Restrict Use of Special Ops*, WASH. TIMES, Aug. 12, 2003, at A01 (reporting impending amendment of Intelligence Authorization Act of 1991).

[518] The United States Special Operations Command (USSOCOM) was formed on April 1, 1987 and tasked to train and equip special operations forces as the branch of the Armed Forces with primary responsibility for a variety of rapid-reaction, critical missions of strategic importance, including, *inter alia*, counterterrorism. *See* Department of Defense Authorization Act of 1987, P.L. 99-661, § 1311, 100 Stat. 3983-86 (1986) [hereinafter Cohen-Nunn Amendment] (mandating creation of USSOCOM, a Board for Low-Intensity Conflict within the National Security Council, and the position of Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict); Department of Defense Authorization Act of 1986, P.L. 99-145, § 1453(a)(3), 99 Stat. 760 (1985) ("The special operations forces of the Armed Forces provide the United States with immediate and primary capability to respond to terrorism."). By capitalizing upon "speed, surprise, audacity, and deception" they "accomplish missions in ways that minimize risks of escalation and maximize returns compared with orthodox applications of military power," rendering special operations forces particularly suited to covert counterterrorism missions. JOHN M. COLLINS, SPECIAL OPERATIONS FORCES: AN ASSESSMENT 6 (1994). As such, in practice special operations forces play an inordinate role in the "protect[ion] [of] their parent society against disorder, intimi-

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dation, and terrorism." LLOYD, *supra* note 104, at 204.

Special Forces, drawn from each of the components of the Armed Forces and organized into Special Operations Groups, are one of the components of the broader community of special operations forces, which include psychological operations, civil affairs forces, Rangers, Marines and aviators. United States Army Special Forces, known colloquially as "Green Berets," are the most elite soldiers in the Army, selected on the basis of general proficiency, maturity, intelligence, imagination, cognitive flexibility, determination and experience as well as familiarity with local cultures, languages and the politico-economic climates in the geographic regions in which they are operational. Carl W. Stiner, *U.S. Special Operations Forces: A Strategic Perspective*, 22 PARAMETERS 4, 6, 9 (1992). When deployed, Special Forces soldiers operate in twelve-man "Alpha" teams, each of which is a self-contained unit, and employ streamlined communications links, technical and tactical proficiency and an understanding of the incident environment to preserve secrecy and accomplish their missions.

[519] United States Army Special Forces troops have been posted to a number of locations in or near the Middle East and Central Asia following September 11, 2001. *See, e.g.*, Thom Shanker & Eric Schmitt, *U.S. Moves Commandos to Base in East Africa*, N.Y. TIMES, Sept. 18, 2002, at A20 (reporting stationing of hundreds of Special Forces soldiers in East Africa for missions against al Qaeda); Patrick E. Tyler, *Yemen, an Uneasy Ally, Proves Adept at Playing Off Old Rivals*, N.Y. TIMES, Dec. 19, 2002, at A1 (reporting increase in United States Special Forces presence in Yemen in 2002).

[520] United States Army Special Forces soldiers have been training for covert counterterrorist operations at a high operational tempo following September 11th, and have developed a number of missions for rapid execution on short notice. *See Reviewing Ideas for Fighting Terrorists*, N.Y. TIMES, Aug. 3, 2002, at A10 (reporting high-level covert operations planning within USSOCOM for counterterrorist mission post-September 11th).

in civilian clothing rounded a corner, reacted in surprise and began running in the opposite direction shouting warnings in Uzbeki. After brief hesitation, the commander of the mission and of Alpha One, Captain James F. Ryan, grandson of Private Ryan, ordered a team member to kill the would-be messengers. This done, the teams proceeded otherwise unmolested toward their objective.

A dozen lightly armed sentries in Islamic civilian dress were posted in the porticoes surrounding the gardens and twin minarets while guarding the compound. Within minutes Alpha One established perimeter security while Alpha Two moved into position, quickly and quietly eliminated the sentries and accessed the building. While Alpha One maintained security, Alpha Two moved through the assembly area and down the ornate corridors and into the *madrasa*, the living quarters for the religious teachers and students. There, stored in sealed crates readied for shipment and stamped with markings indicating their contents to be religious literature, were what Alpha Two estimated, and subsequent scientific testing established, to be more than two tons of weapons-grade anthrax genetically modified to be extremely antibiotics-resistant and readily dispersible by inhalation.[521] While Alpha Two collected samples and planted a series of incendiaries, chlorine dioxide and high explosive devices throughout the weapons cache,[522] Alpha One, maintaining security, began to come under fire from a rapidly gathering number of armed men dressed in civilian clothing but suspected to be al Qaeda terrorists. Alpha Two emerged from the mosque, requested evacuation and joined Alpha One in suppressing opposition as the force of the battle mounted. Although the United States force had begun to absorb casualties, none were serious, and the coordinated and accurate fire from the Alpha teams inflicted far more devastating consequences upon the enemy, a number of whom burst into houses and dragged unarmed civilians, including women and children, into the streets as human shields against United States fire.[523] Despite their best efforts, which included the use of non-lethal weapons such as blinding lasers[524] and riot control agents[525] to disorient and disable attackers, the Alpha teams were unable to prevent civilian casualties as they defended against the al Qaeda assault. By the time the MH-60 Black Hawk helicopters began circling overhead, hundreds of bodies littered the streets surrounding the Central Mosque.[526] As several companies of Uzbeki infantry encircled

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[521] *See* Anthrax Highlights, *at* http://www.mercola.com/2001/oct/10/anthrax_highlights.htm (last visited June 6, 2004) (discussing properties of anthrax)

[522] The destruction of anthrax requires either extremely high temperatures or exposure to potent biocides such as chlorine dioxide. *See* U.S. Environmental Protection Agency, *Anthrax*, *at* http://www.epa.gov/epahome/hi-anthrax.htm#FORRESPONDERS (last updated June 8, 2004); *see also* Center for Disease Control, Division of Bacterial and Mycotic Diseases, *Disease Information: Anthrax*, *at* http://www.cdc.gov/ ncidod/dbmd/diseaseinfo/anthrax_g.htm#Whatisanthrax (last updated May 2, 2003) (discussing lethality and methods of destroying anthrax). The oxidizing effects of chlorine dioxide are enhanced by high temperatures. *See* IPCS INCHEM, *Chlorine Dioxide*, *at* http://www.inchem.org/documents/icsc/icsc/eics0127.htm. (last visited June 6, 2004). Consequently, the choice of a combination of incendiary, biocidal and explosive devices would likely be used to neutralize a large volume of anthrax. *See, e.g.*, Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AM. J. INT'L L. 481, 489 (2003) (recounting decision of General Colin Powell and Secretary of Defense Rich-

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ard Cheney to target Iraqi biological weapons during the 1991 Gulf War with incendiary and biocidal measures).

[523] This practice was employed by Somali warlords against United States forces operating to provide humanitarian relief during the civil war in Somalia in 1992-1993. *See* Lorenz, *supra* note 510, at 36 (discussing numerous violations of IHL by Somali warlords during the Somali Civil War). Iraqi troops very effectively used civilians to shield themselves against United States operations in March 2003. *See* Dexter Filkins, *Either Take a Shot or Take a Chance*, N.Y. TIMES, Mar. 28, 2003, at A2 (reporting United States troops declined repeatedly to engage Iraqi soldiers employing women and children as human shields but that some such civilian hostages were killed as a result of United States fire directed at Iraqi military targets).

[524] Tactical blinding lasers are specially designed to temporarily blind enemy forces in order to provide force protection without causing unnecessary casualties, and special operations missions and hostage rescue situations are particularly suitable uses. *See* Burrus M. Carnahan, *Unnecessary Suffering, The Red Cross and Tactical Laser Weapons*, 18 LOY. L.A. INT'L & COMP. L.J. 705, 729 (1996) ("A blinding laser rifle may be useful from a humanitarian standpoint in dealing with hostage situations, where enemy forces are using civilians as a shield. Blinding some or all of the enemy forces may . . . permit the hostages to escape.").

[525] "Riot control agents" are chemical irritating substances such as CS gas and pepper spray used to temporarily "distract, deter, or disable disorderly people" without permanent injury to permit friendly forces to operate unimpeded. U.S. DEP'T OF ARMY, FIELD MANUAL 19-15, ch. 9, *Riot Control Agents* (Nov. 25, 1998).

[526] Even where women and children divest themselves of the privileges of

United States forces, the Black Hawks dropped ropes, lifted the Alpha teams to safety and brought suppressive fire to bear before speeding southward through the airspace of Uzbekistan, Afghanistan and Pakistan to the United States. Carl Vinson waiting on station in the Arabian Sea.

Minutes later, as the recorded voice of the *muezzin* began calling the faithful to prayers from loudspeakers atop the Central Mosque, chlorine dioxide gas began seeping into the surrounding neighborhood, and thousands of civilians rising from their beds were afflicted with hacking coughs, headaches, and shortness of breath. Panicked soldiers and civilians fled as the mosque began to burn. As the flames jumped to nearby houses, a series of explosions tore through the stricken mosque. Thick clouds of smoke drifted on a gentle breeze blowing from the east, smudging the rising sun from view. The Central Mosque burned to rubble over the course of the day.

One hour after United States forces departed Uzbekistan, the U.N. Secretary-General received a personal letter from the President which noted that Uzbekistan was a "Barbary State upon which the civiized world had no choice but to impose law and order,"[527] that there was no distinction between terrorists and those who harbored them, that "[i]n light of the present anarchic and hostile world environment, [the U.S.] must defend itself in evry possible way,"[528] that "the world had reverted to [a] primitive system"[529] because the Security Council had "re-

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noncombatancy by taking up arms, members of the United States Armed Forces are very reluctant to fire upon them. *See* Lorenz, *supra* note 510, at 39 (describing emotional difficulties encountered by United States forces in Somalia engaged by armed women and children). Where women and children are employed against their will as human shields, the reluctance expands to include the reluctance to bring fire down upon their captors lest innocents become inadvertent and unintended casualties. *Id.*

[527] *See* El-Ayouty, *supra* note 463, at 492 (arguing in 1999 that Afghanistan, under the Taliban, had abdicated state responsibility to suppress terrorism and "should be treated as a Barbary State" upon which "law and order should be imposed . . . from the outside until it co-operates internationally [with] the extradition or the apprehension in prosecution and punishment of all those implicated in th[e] genocidal war against the American people.").

[528] Johnson, *supra* note 507, at 293-94.

[529] Myres McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 507, 597-98 (1963).

peatedly [and] materially breached its obligations to the world community" and "damaged its own credibility as an enforcer of international law,"[530] that the United States had "acted pursuant to the right of self-defense confirmed by Article 51 of the Charter of the United Nations," and that the "target struck, and the time and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality."[531] At H-Hour Plus Three, 8:00 P.M. Eastern Time, the President of the United States addressed the nation in a live broadcast carried by national networks around the globe. In his hour-long address, the President stated that "[t]oday, we have done what we had to do. If necessary, we shall do it again."[532] The President stated further that the "reckless threats and attacks on Americans" had created an "imminent danger" against which the United States was "entitled to take measures necessary to defend our nation and its people."[533] Although the United States "regretted the loss of civilian life," the President stated,

> I was forced to order this action, as an obligation of the office with which the American people have entrusted me, for five reasons: First, because we have convincing evidence that al Qaeda, supported and sheltered by the Yuldashev regime, are the authors of the recent attacks on American citizens and property in Central Asia; second, because al Qaeda had executed murderous terrorist attacks on the United States in the

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[530] Lysobey, *supra* note 496, at 103-04.

[531] This language is drawn from correspondence delivered by the United States Ambassador to the United Nations to the U.N. Secretary-General formally notifying the U.N. of the United States attack on terrorist targets in Sudan and Afghanistan in 1998. *See* Letter from Bill Richardson, Permanent Representative of the United States to the United Nations, to the President of the U.N. Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998), *available at* http://www.undp.prg.missions/usa/s1998780.pdf.

[532] These precise words were uttered by President Ronald Reagan in announcing the bombing of Libya in reprisal for the attack on a West Berlin disco in 1986. President Ronald Reagan, Address (Apr. 14, 1986), in WASH. POST, Apr. 15, 1986, at A23.

[533] *See* President George Bush, Statement (Dec. 20, 1989) (transcript on file at the George Bush Presidential Library in College Station, Texas) (announcing the United States intervention in Panama).

> past, most notoriously on September 11th, 2001; third, because we have compelling information that Uzbekistan and al Qaeda were planning additional terrorist attacks against our citizens and those of other countries; fourth, because these terrorists and their state sponsors had acquired biological weapons and other weapons of mass destruction which they had stored in a place of worship and which they intended to use in a genocidal war against this great nation; and fifth, because the failure of the U.N. and NATO to play a serious role in the maintenance of peace left us no choice but to act alone.[534]

The President stated that although the United States would continue to observe international law it would not "respond like a man in a barroom brawl who will fight only according to Marquis of Queensbury rules"[535] because "[t]he world isn't Beverly Hills, it's a bad neighborhood at [two] o'clock in the morning."[536] Law will not be perverted by evildoers into an instrument to be used to restrain and threaten people who desire to live in peace and justice. We will defend ourselves against enemies who store weapons of mass destruction in houses of worship and who hide behind their own women and children when called to task." He concluded by promising,

> The United States "will not stand by as peril draws closer and closer . . . If we wait for threats to fully materialize, we will have waited too long."[537] The "survival of states is not a matter of law"[538] but rather a question of courage. We will

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[534] This "quote" is very loosely patterned after the statement offered by President William Clinton as justification for United States attacks against al Qaeda in 1998. *See* President William Jefferson Clinton, Address at the White House (Aug. 18, 1998), *at* http://www.time.com/time/daily/special/asbombing/clintonwash.html (last visited June 10, 2004).

[535] Johnson, *supra* note 507, at 294 (quoting an unidentified former CIA officer).

[536] *Id.* (quoting a statement by G. Gordon Liddy, former CIA officer and Watergate conspirator, made on the campus lecture circuit).

[537] President George W. Bush, Remarks by the President at the 2002 Graduation Exercise of the United States Military Academy at West Point (June 1, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/05/20020523-2.html.

[538] Dean Acheson, *Remarks by the Honorable Dean Acheson*, 1963 PROC. AM. SOC'Y INT'L L. 13, 14 (remarks made in context of the Cuban Missile Crisis).

> remain vigilant in the defense of civilization against barbarism, and those who by their actions declare themselves beyond the pale of human civilization shall be treated accordingly by a nation aroused as never before in its history. They shall reap that which they sow. As the Book of Job teaches us, we shall "put out the lamps of the wicked, . . . and they shall be like straw before the wind, and chaff that the storm carries away."[539]

The next day, President Yuldashev angrily denounced Operation Jeremiah, which he claimed was responsible for more than 800 civilian casualties,[540] reiterated his claim that Uzbekistan possessed no prohibited weapons and demanded that the Security Council meet in emergency session to impose sanctions. Although a Sino-Soviet effort to pass a resolution in the Security Council condemning the United States action failed in the face of a U.S.-U.K. veto,[541] the U.N. Secretary-General angrily condemned the operation in an open letter published in the *New York Times*. Additionally, the General Assembly passed a resolution in denunciation[542] calling upon the United States to "arrest and prosecute those responsible for war crimes and crimes against humanity in accordance with international law."[543] Most of the world, after viewing pictures of the carnage and the destroyed mosque, was outraged.[544] Within forty-eight hours, international anti-United States sentiment exploded when CNN began broadcasting reports[545] that several thousand Uzbeki civilians had been hospitalized with symptomatology including fever, malaise and respiratory distress, and preliminary toxicological reports provided by the Uzbeki national medical service and the World Health Organization (WHO) indicated exposure to chlorine dioxide and anthrax. Within the next two days, fifty thousand Uzbekis were hospitalized and the WHO reported ten thousand Uzbeki fatalities. Although the United States offered to airlift antibiotics and experts from the Center for Disease Control, President Yuldashev rejected the United States offer, and within five days after the raid more than seventy-five thousand Uzbekis were dead.[546] A joint communiqué promulgated by the League of Arab States and the Organization of the Islamic

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[539] *See Job* 21:17-18.

[540] Many of the claimed civilian casualties that resulted from the firefight with the Alpha Teams were terrorists who had entered into battle in civilian clothing. The separation of legitimate civilian casualties from terrorists or irregular forces is often not attempted by the regimes that support terrorism or by the NGOs who lend credence to their claims. *See* WASH. POST, Jan. 7, 1990, at A22 (reporting that as many as thirty percent or more of the "civilian" casualties reported in the United States invasion of Panama in 1989 were in fact members of the Noriega-led Panamanian Defense Forces who chose to fight in civilian clothing).

[541] The Soviet Union and China attempted and failed, due to a U.S.-U.K.-French veto, to issue a resolution condemning the United States attack on Libya in 1986 and rejecting the Article 51 justification offered by the United States. *See* Ivan Zverina, *U.S., Britain, France Veto U.N. Condemnation of Raid on Libya*, UNITED PRESS INT'L, Apr. 21, 1986.

[542] In response to the United States attacks on terrorist facilities in Libya in 1986, the General Assembly passed a resolution condemning the military action. *See* G.A. Res. 41/38, U.N. GAOR, 41st Sess., 78th mtg., 1986 U.N.Y.B. 257.

[543] The General Assembly resolution cited a 1973 resolution calling for every state to cooperate in the arrest and prosecution of persons suspected of committing war crimes and crimes against humanity. *See* Principles of International

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Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity G.A. Res. 3074, U.N. GAOR 3d Comm., 28th Sess., 2187th plen. mtg., Supp. No. 30, at 78, U.N. Docs A/9326 and A/9030 (1973).

[544] Much of public opinion across the globe was intensely critical of the United States decision to attack terrorist facilities in Sudan and Afghanistan in 1998, an operation undertaken for the same purposes, against the same sort of threat, and in the same circumstances of a lack of multilateral political support in the United Nations. *See* Bashir Maa, *Missiles Will Only Make Matters Worse*, HERALD (Glasgow), Aug. 24, 1998, at 13. To some extent, the expression of short-term outrage for the attack upon the targeted state is the product of informational asymmetry remediable only by the risky dissemination of the information motivating the targeting decision; where a state undertakes a preemptive strike under circumstances such as those presented herein, "the targeted state is often able to command instant sympathy, while the preemptive attacker may require more time to publicize its intelligence information and elaborate its justifications, both of which may ultimately prove to be more persuasive to the international decision process." Reisman, *supra* note 108, at 17-18.

[545] Journalists evaluating the claims of innocence proferred by rogue regimes and terrorist groups in response to United States military operations undertaken to destroy WMD in the past have not generally been critical of such claims and have instead given them credibility in their coverage. *See* David, *supra* note 40, at 376 (noting that journalists reported rather uncritically the Iraqi claims that a military command-and-control facility located in a civilian area in Baghdad was in fact a bomb shelter protecting civilians).

[546] The incubation period varies between one-to-five days, but exposure left untreated for the first twenty-four hours is fatal in over ninety percent of cases. Keefer, *supra* note 482, at 110 n.9.

Conference condemned the "use of biological weapons against Uzbeki civilians" as an "unlawful act of aggression and a crime against humanity,"[547] and the U.N. Secretary-General met with President Yuldashev in Tashkent and demanded that the United States launch an investigation "to determine the criminal responsibility of those involved in the attack on the house of worship."

In his second national address, the President of the United States stated that the outbreak of anthrax in Uzbekistan, while unfortunate, had resulted from the partially successful attempt to eliminate BWs that the Yuldashev regime had permitted al Qaeda to stockpile and that any civilian casualties resulting from the United States action were directly attributable to al Qaeda and to the Uzbeki Government; consequently, the United States would not be investigating any parties involved in the operation but would be decorating them, where appropriate, for heroism. Congress passed a joint resolution commending the President and the members of the Armed Forces that conducted Operation Jeremiah, and polling indicated over ninety percent domestic approval. Two weeks after the strike, President Yuldashev personally lodged a declaration with the ICC Registrar accepting, on behalf of Uzbekistan, as the territorial state, the exercise of ICC jurisdiction with respect to the United States attack on the Central Mosque[548] and requesting that the ICC Prosecutor "investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of . . . crimes."[549] Within a week, the Prosecutor concluded on the basis of information submitted by Uzbekistan, other U.N. members and human rights NGOs[550] that a reasonable basis existed to investigate, and he submitted to the Pre-Trial Chamber a request for authorization.[551] The Pre-Trial Chamber found there was a "reasonable basis to proceed" and that the case was within ICC jurisdiction, and he thus authorized the investigation.[552] The United States' efforts to procure a Security Council resolution deferring the investigation for twelve months were trumped by a Sino-Soviet veto.[553]

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[547] This language is drawn from a similar communique issued after the United States attack on terrorist targets in Sudan and Afghanistan in 1998. *See* Letter from the Permanent Observer of the League of Arab States to the President of the Security Council, U.N. Doc. S/1999/997, Annex, para. 7 (Sept. 23, 1999).

[548] Uzbekistan signed the Rome Statute on December 29, 2000, though it has not ratified that instrument as of September 2003. For a list of current parties, see http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp. Non-party states may accept the jurisdiction of the ICC in a particular case. Rome Statute, *supra* note 32, art. 12(3). The "opt-out" provision permits states, upon acceding to membership, to accept ICC jurisdiction generally while declining with respect to war crimes for a seven year period. Rome Statute, *supra* note 32, art. 124 ("[A] State, on becoming a party . . . , may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [war crimes] when a crime is alleged to have been committed by its nationals or on its territory."). Critics of the ICC interpret the opt-out provision as allowing a state willing to commit war crimes

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to accede to the Statute only to opt out of war crimes jurisdiction, thus insulating its personnel from ICC prosecution for war crimes while a nonparty dispatching peacekeeping forces to that state would find them immediately subject to ICC war crimes prosecutions. *See* Transcript of Statement by Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court Before the Senate Foreign Relations Committee, Washington, D.C., U.S. Dep't of State Dispatch, Aug. 1, 1998, *available in* 1998 WL 12885550.

[549] Rome Statute, *supra* note 32, art. 14(1).

[550] The Prosecutor has discretion to seek information from any "reliable sources that he or she deems appropriate" in determining whether to bring an indictment, including "non-governmental organisations." *Id.* art. 15(2).

[551] *Id.* art. 15(3). Under these circumstances where the evidence relied upon to launch a military operation is wholly within the control of the attacking state, the defending state denies the existence of WMD and the attacking state refuses to conduct a domestic investigation, it might well be "difficult to see how [the Prosecutor] would be able to conclude . . . that no crime within the Court's jurisdiction has been committed." David, *supra* note 40, at 398-99. Moreover, even if the attacking state agreed to share its intelligence and conduct a domestic investigation, the ICC might elect to conduct its own investigation to independently corroborate or refute the evidence proferred by the attacking state and to establish its independence. *Id.*

[552] Rome Statute, *supra* note 32, art. 15(4).

[553] *See id.* art. 16 (providing that the U.N. Security Council may adopt a resolution under Chapter VII deferring an investigation or prosecution for a renewable twelve-month period); *see also* Todd M. Sailer, Comment, *The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 TEMP. INT'L & COMP. L.J. 311, 342 (1999) (elaborating the "Singapore Compromise" achieved at the drafting conference which permits deferral of an investigation or prosecution if all five permanent members of the Security Council "believe[] that the ICC would interfere with the Council's efforts to further international peace and security." (citation omitted)). The power of

On March 15, 2006, after a month-long investigation during which an additional forty-thousand Uzbeki civilians died from anthrax inhalation, the Prosecutor sparked a firestorm with his announcement of the indictments of each member of the Alpha Teams, the commander of USSOCOM, the CJCS, the Secretary of Defense and the President on multiple counts of aggression, war crimes, and crimes against humanity in the context of Operation Jeremiah.[554] Although the United States, a non-party to the Rome Statute, brought a jurisdictional challenge, the ICC, self-determining its jurisdiction,[555] held that the case was properly before it. Moreover, the ICC held that the United States decision not to investigate was made to shield persons from criminal responsibility and rendered it admissible as a result.[556] The indictment charged all defen-

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the U.N. Security Council to block the exercise of ICC jurisdiction is predicated upon Article 103 of the U.N. Charter (the international "Supremacy Clause"), which ensures that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail." U.N. Charter, art. 103. The Security Council has previously exercised this power. *See* Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K. and U.S. 1992 1 C.J. 1 (Apr. 14) (holding that U.N. Security Council could, under UNSCR 748 (1992) b,ypass an existing treaty mechanism for the prosecution of individuals in order to determine, a priori, the question of state responsibility for the crimes in question). Whether it will do so in a given case is a political question. A United States proposal that would have automatically stayed ICC actions in any matter of which the Security Council was seized under Chapter VII was defeated. Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 321-22 (1998).

[554] The prosecution of senior United States military commanders and civilian government officials in an international tribunal for their actions in ordering and planning military operations has been attempted previously, albeit unsuccessfully. *See* Slaughter, *supra* note 35, at 1 (noting that in 1999 the Russian Foreign Minister denounced the NATO campaign in Kosovo and called for United States and NATO commanders to be prosecuted in the ICTFY).

[555] *See* Rome Statute, *supra* note 32, art. 19 (providing that the ICC "shall satisfy itself that it has jurisdiction.").

[556] *See id.* art. 17 (providing that a case is within ICC jurisdiction if a decision not to investigate or prosecute "resulted from the unwillingness or inability of the State genuinely to prosecute," and that unwillingness is to be determined by considering whether "the national decision was made for the purpose of shielding the person concerned from criminal responsibility."). Some scholars interpret "un-

dants with "Crimes Against Humanity" under Article 7(a), (f) and (k)[557] and "War Crimes" under Article 8(2)(a)(i), (ii), (iii) and (iv) as well as 8(2)(b)(i), (ii) (iii), (iv), (ix), (xiii), (xvii), (xviii), (xx)[558] and charged the President and the Defense Secretary with command responsibility[559] for "Aggression"[560]

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willingness" to require the Prosecutor to show "devious intent" on the part of a state. Louise Arbour & Mark Bogsmo, *Conspicuous Abuse of Jurisdictional Overreach*, *in* REFLECTIONS, *supra* note 31, at 131. Others suggest that "the [ICC] could find the case admissible and exercise its jurisdiction, rather than defer to [United States] proceedings conducted in good faith," on the ground that the Rome Statue creates the presumption that a decision not to investigate or prosecute is *ipso facto* a manifestation of "devious intent." Gurule, *supra* note 46, at 27.

[557] "'[C]rime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; . . . (f) Torture; . . . (h) Persecution against any identifiable group . . . ; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Rome Statute, *supra* note 32, art. 7.

[558] *See id.* art. 8(2)(a) (defining "war crimes" as, in addition to grave breaches of the Geneva Conventions, "(i) Wilful killing; (ii) Torture or inhuman treatment; (iii) Wilfuly causing great suffering, or serious injury to body or health; [and] (iv) Extensive destruction and appropriation of property, not justified by military necessity."). Article 8(2)(b) defines "war crimes" as

> serious violations of the laws and customs applicable in international armed conflict, . . . namely . . . (i) intentionally directing attacks against the civilian population as such . . . ; (ii) Intentionally directing attacks against civilian objects . . . ; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . clearly excessive in relation to the concrete and direct overall military advantage anticipated; . . . (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, [and] hospitals . . . provided they are not military objectives; . . . (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; . . . [and] (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of [IHL], provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute.

Id. art. 8(2)(b).

[559] By virtue of their unique responsibility commanders are obligated, as "'society's last line of defense' against war crimes," to "control . . . a military force's organic capacity for destruction and the conduct of their subordinates."

Smidt, *supra* note 282, at 166-67. Command responsibility is "the legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit." DEP'T OF THE ARMY, FIELD MANUAL 101-5,1-1 (1997). Theoretically, command responsibility extends up the chain of military and civilian command to the highest reaches of power, although in practice it is largely immediate military commanders who are under a duty to ensure that their subordinates observe IHL. C.J. GREENWOOD, COMMAND AND THE LAWS OF ARMED CONFLICT 35 (1993). Prior to World War II, the limits of commanders' responsibility extended only so far as to preclude issuance of unlawful orders. ROGERS, *supra* note 42, at 130 (stating that criminal liability for acts of subordinates that do not flow from superiors orders is a "comparatively recent development"); U.S. WAR DEP'T, RULES OF LAND WARFARE ¶ 366 (1917) [hereinafter RULES OF LAND WARFARE (1917)] (stating that although commanders who issued illegal orders could be held criminally liable, mere toleration of unlawful conduct was insufficient). Neither the Nuremberg nor the Tokyo Tribunal directly criminalized failure to prevent atrocities. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1547 (1945) ("Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by the persons in execution of such plan."). Still, the enduring legacy of prosecutions of Axis war criminals, and one of the grounds opponents seized upon to brand these proceedings "victor's justice," is the extension of liability on a negligence theory. *See Trial of General Tomoyuki Yamashita*, 4 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 35 (William S. Hein Co. 1997) (1945) (convicting commander of Japanese Army, Philippines, for murder of United States POWs despite no charge or evidence that he knew or approved, on the inference that given their scale he must have known they were occurring); U.S. v. Soemu Toyoda (Official Transcript) (convicting Commander in Chief of Japanese Fleet of command responsibility for failure to learn of violations committed by his troops); High Command Case, *supra* note 307, at 543-44 (convicting commanders where a "personal dereliction . . . amounting to a wanton, immoral disregard of the [unlawful] action of [their] subordinates," including execution of United States POWs, constituted "criminal negligence"). Still, the World War II prosecutions did not create an absolute liability standard for commanders, who "cannot keep completely informed of the details of military operations of subordinates," nor did they equate mere knowledge of violations with criminal liability. *The Dostler Case*, 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 22 (William S. Hein Co. 1997) (1948) (holding that "mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law" and that a commander could be held liable only where he "orders, abets, or takes a consenting part in the crime."); *The Trial of General Tomoyuki Yamashita*, *supra*, at 35 ("It is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape."). The contemporary formulation provides that criminal responsibility can be imputed to the commander, even if he did not issue orders requiring violations of IHL, only if he had effective control over forces under his command (the "structural element") and either knew or should have known that his subordinates would commit the violations (the "mental element") and failed to take reasonable mea-

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sures to prevent and/or punish their commission (the "physical element"). *See* API, *supra* note 105, art. 87 ("[A]ny commander who is aware that subordinates or other persons under his control are going to commit, or have committed a breach of the conventions or of this Protocol, [is obliged] to initiate such steps as are necessary to prevent violations of the conventions or this Protocol. . . ."). This restrictive contemporary standard is adopted in the Rome Statute, art. 28 and in United States military regulations, which require that the prosecutor prove either that the commander issued a direct order requiring a subordinate to execute a manifestly unlawful act or that the commander is grossly negligent in supervising subordinates. *See* FM 27-10, *supra* note 43, ¶ 501 (providing that "commanders may be responsible for war crimes committed by subordinate[s] . . . when the acts in question have been committed in pursuance of an order . . . [or] if [the commander] has actual knowledge, or should have knowledge, through reports received by him . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."); UCMJ, 10 U.S.C. § 877 (2000) (providing that command responsibility requires proof a commander intended to and did in fact encourage subordinates to commit the unlawful act). Although in practice courts-martial, on the rare occasions they adjudicate an allegation of command responsibility, are prone to apply an even more restrictive standard that permits liability only where a commander is alleged to have issued an unlawful order, the de jure standard is identical to that at IHL—either a direct order, or gross and wanton negligence, is required to sustain a charge, and evidence necessary to prove such negligence is limited, essentially, to the failures to train troops in advance and investigate after the fact. *See* Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 21 (1972) (stating that no principle of United States military law requires a commander to restrain acts of subordinates he has not ordered); Smidt, *supra* note 282, at 193 (concluding that in practice courts-martial employ the very restrictive standard requiring proof of a direct order or post hoc failure to investigate to sustain a charge). Still, the precise standard the ICC will employ to determine whether to impute knowledge of violations of IHL to a commander—whether actual or constructive knowledge, or mere negligence—is unclear. Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L L. & POL. 792, 852 (2002). Similarly, where a commander is alleged responsible on a negligence theory, liability ultimately requires an determination of whether the act was so manifestly unlawful that a reasonably diligent commander would have learned of and prevented it or, at the very least, investigated and prosecuted its author; the discovery that subordinates committed acts not manifestly unlawful would not necessarily obligate investigation or punishment. OSIEL, *supra* note 23, at 161. Because the Rome Statute does not specify which acts are manifestly unlawful, the precise boundaries of a commander's legal responsibility remain unclear. Finally, the Rome Statute is silent on whether a commander can discharge supervisory responsibilities, and thus offer an absolute defense, by proving his subordinates were trained in IHL and provided access to legal officers. ROGERS, *supra* note 42, at 141.

[560] The scenario presumes, contrary to facts, that 7/8 of the Assembly of States Parties agreed to a definition of "aggression," that the preclusion on prosecution

under Articles 5, 25,[561] 27,[562] and 28.[563]

Count One charged all defendants with crimes against humanity[564] for "engaging in a conspiracy to commit, and

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of the crime of aggression for 7 years after entry into force of the Rome Statute is inoperative, and that prosecution of an individual for the crime of aggression does not require a prior determination of the Security Council that his state of nationality, on behalf of which he is alleged to have undertaken acts constituting the elements of the crime, has engaged in aggression. *See supra* note 101 (discussing legal issues concerning the definition of and preconditions to the prosecution of the crime of aggression). The following definition is employed for purposes of this scenario:

> 1. For purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing . . . political actions in his State, against another State, in contravention of the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State. 2. Acts constituting aggression include the following: (a) the invasion or attack by the armed forces of a State of the territory of another State, any military occupation, however temporary, resulting from such invasion or attack . . . (b) bombardment by the armed forces of a State against the territory of another State; [or] . . . (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State . . . .

David, *supra* note 40, at 389-90, 411 (offering prospective definition of aggression).

[561] *See* Rome Statute, *supra* note 32, art. 25(3)(b) (providing that a person shall be criminally responsible if he "[o]rders, solicits or induces the commission of . . . a crime which in fact occurs").

[562] *See id.* art. 27(1) (providing for the applicability of the Rome Statute "without any distinction based on official capacity . . . as a Head of State or Government, a member of Government . . . or a government official").

[563] *See id.* art. 28. Article 28 establishes command responsibility liability by providing:

> military commander . . . shall be criminally responsible for crimes . . . committed by forces under his or her effective command and control . . . where: (a) [t]hat . . . person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and . . . (b) that . . . person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to competent authorities for investigation and prosecution.

Id.

[564] The concept of a "crime against humanity" entered into existence not by way of a multilateral treaty or by the ripening of custom into law but rather with Article 6(c) of the Charter of the IMT, which defined it as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial, or religious

committing, an armed attack on the Central Mosque in Namangan, Uzbekistan, a civilian house of worship, on or about January 5th and 6th, 2006, in a manner and by means, including chemical weapons and blinding lasers, intentionally calculated to systematically and directly expose civilians to great mental and physical suffering amounting to torture,[565] serious injury, and death and which did in fact cause torture, injury, and death." Count Two charged all defendants with war crimes for "unenumerated violations of the laws or customs of war, as recognized by Articles of the Statute of the ICC and sources of conventional and customary law, including but not limited to UNGA Resolution 2444[566] and 3675,[567] Article 26

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grounds . . . ." Charter of the IMT, *supra* note 32, art. 6. Under customary IHL as it has developed, a crime against humanity is one of a list of prohibited acts committed as part of a widespread or systematic attack pursuant to or in furtherance of a state or organizational policy directed against any civilian population with knowledge of the attack. Prosecutor v. Tadic, 1997 I.C.T.Y. IT-94-1-T, ¶¶ 624-26 (May 7) (Opinion and Judgment) (citing Article 5, ICTY) (creating jurisdiction over crimes against humanity). The existence of an armed conflict is not required as an element of a crime against humanity, but acts prohibited as crimes against humanity typically "involve, or at least occur in the context of, massive killings or mistreatment of civilians in . . . time of armed conflict" under the direction of an *official policy*. Fenrick, *supra* note 12, at 779 (emphasis added). Because crimes against humanity are most often committed during armed conflict by soldiers as agents of their governments, and because the applicability of IHL has been extended through the Geneva Conventions to apply to most internal armed conflicts, there is thus some overlap between war crimes (when civilians are the victims) and crimes against humanity, and several commentator has called for the elimination of distinctions between the two categories of crimes and for their merger into a single analytical concept. *See* L.C. Green, *"Grave Breaches" or Crimes Against Humanity?*, 8 U.S.A.F. ACAD. J. LEG. STUD. 29 (1997-98) (making this argument); Marler, *supra* note 34, at 849 (noting that suspects have been charged in predecessor tribunals with war crimes and crimes against humanity for the same acts).

[565] The Torture Convention, cited by the Prosecution in the Indictment, supplied a definition of torture. *See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 (1984) (defining torture as an intentional act inflicted by or under the responsibility of public officials that causes severe pain).

[566] *See Respect for Human Rights in Armed Conflicts*, G.A. Res. 2444, 23 U.N. GAOR, 23d Sess., Supp. No. 18, at 50, U.N. Doc. A/7433 (1968) (declaring customary IHL principle of civilian immunity and complementary principle requiring belligerents to distinguish civilians from combatants at all times).

[567] *See Basic Principles for the Protection of Civilian Populations in Armed*

of the Hague Convention of 1907,[568] Articles 3, 32, and 53 of the Fourth Geneva Convention of 1949,[569] Article 4(4) of the Hague Convention on Cultural Property,[570] Articles 35(2),[571] 51,[572] 52,[573] 53,[574] 56,[575] and 57[576] of the First Protocol

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Conflicts, G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc A/8028 (1971) (specifying that "every effort should be made to spare civilian populations from the ravages of war").

[568] *See* 1907 Hague Regulations, *supra* note 411, art. 26 (providing that the "officer in command of an attacking force, before commencing a bombardment, except in the case of an assault, do all in his power to warn the authorities").

[569] *See* GCIV, *supra* note 398, art. 3(1)(a) (prohibiting the application of "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" to civilians and to combatants rendered hors de combat); *id.* art. 32 (prohibiting the taking of any measures "of such a character as to cause the physical suffering or extermination of protected persons," including "murder, torture, corporal punishments, [and] mutilation"); *id.* art. 53 (prohibiting "[a]ny destruction . . . of real or personal property . . . except where such destruction is rendered absolutely necessary by military operations").

[570] *See* Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, art. 4(4) (obligating states-parties to "refrain from any act directed by way of reprisals against cultural property").

[571] *See* API, *supra* note 105, art. 35(2) ("It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.").

[572] API, *supra* note 105, art. 51, stating:

> (1) The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations . . . . (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. (3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities. (4) Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. (5) Among others, the following types of attacks are to be considered as indiscriminate: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive

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> in relation to the concrete and direct military advantage anticipated. (6) Attacks against the civilian population or civilians by way of reprisals are prohibited. (7) The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population . . . in order to attempt to shield military objectives from attacks or to shield military operations. (8) Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians . . . ."

Id.

[573] API, *supra* note 105, art. 52, stating:

> (1) Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2. (2) Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. (3) In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Id.

[574] *See* API, *supra* note 105, art. 53 ("[I]t is prohibited: (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) To use such objects in support of the military effort; (c) To make such objects the object of reprisals.").

[575] API, *supra* note 105, art. 56, stating:

> 1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population. 2. The special protection against attack provided by paragraph 1 shall cease: (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support; (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support; (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and

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> direct support of military operations and if such attack is the only feasible way to terminate such support. 3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph I is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces. 4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals. 5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations. 6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces. 7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

Id.

[576] API, *supra* note 105, art. 57, stating:

> 1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. (2) With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (c) effective ad-

Additional, and Articles 4(2),[577] 13,[578] 15,[579] 16,[580] of the Second Protocol Additional, occasioned by the unlawful, wanton, and indiscriminate armed attack, not justified by necessity and out of proportion to any legitimate military purpose and without warning to civilian inhabitants, upon the Central Mosque, a historic facility dedicated to a religious purpose and known by defendants to be so, with lasers, asphyxiating gases, and other weapons of mass destruction[581] in a manner calcu-

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> vance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit. (3) When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. 4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects. 5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Id.

[577] *See* Protocol II Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(2)(a) [hereinafter APII] (providing that noncombatants and civilians are to be protected against, inter alia, "violence to the life, health and physical or mental well-being").

[578] *See id.* art. 13 ("The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations . . . . [and] shall not be the object of attack . . . .").

[579] *See id.* art. 15 (providing unqualified immunity for specified civilian facilities).

[580] *See id.* art. 16 (providing for the protection of cultural objects and houses of worship without waiver in cases of necessity).

[581] Due to unresolved disputes over the inclusion of the use of nuclear weapons as a war crime, as of 2003 the Rome Statute does not expressly prohibit the use of WMD or other weapons systems, requiring that "weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of [IHL]" must be "the subject of a comprehensive prohibition" and be "included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123." Rome Statute, *supra* note 32, art. 8(2)(b)(xx). However, the Prosecutor might be able charge the use of riot control agents and chlorine dioxide gas by the United States as illegal methods of war, and thus war crimes, through Article 8(2)(b)(xvii) and/or (xviii), which prohibit the employment of poison and poisoned weapons as well as asphyxiating and poisonous gases. Rome Statute, *supra* note 32, art. 8(2)(b)(xvii), (xviii); *see also* Bailey, *supra* note

lated to cause widespread death, inhuman treatment, and unnecessary suffering to civilians, as well as the unnecessary and willful destruction of civilian property, and which did in fact cause such death and unnecessary suffering to many thousands of civilians and the extensive destruction of civilian property."[582] Count Three charged the SOCOM CinC, CJCS, the Secretary of Defense, and the President with aggression, alleging that by "dispatching members of the Armed Forces of the United States to invade the sovereign state of Uzbekistan, occupy Uzbeki territory, and attack the Central Mosque with conventional weapons and weapons of mass destruction," the defendants had, "without justification[583] or authorization,[584] em-

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496, at 110 (arguing on behalf of this interpretation). With respect to blinding lasers, potential criminal liability under Article 8, if not Article 7, is much less clear. The ICRC has denounced blinding lasers as a cause of unnecessary suffering prohibited under existing IHL and advanced the adoption of a protocol to the CCW prohibiting the employment of "laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices." Additional Protocol to the Convention on the Prohibition or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Blinding Laser Weapons (Protocol IV), CCW/CONF.1/7 (Oct. 12, 1995), arts. 1, 2. Moreover, the ICRC has rejected claims that blinding lasers can inflict merely temporary blindness, that the suffering such weapons inflict are justified by the military advantage gained through their use, and that blinding lasers, as nonlethal weapons, necessarily inflict less suffering than weapons that induce fatalities. *See* INT'L COMMN. OF THE RED CROSS, BLINDING WEAPONS, 3, 4, 7 (Louise Doswald-Beck ed., 1993) (stating that "anyone whose eyes are hit by the [laser] beam would be blinded, in most cases permanently and that "it is impossible to develop a laser which can only flash blind"). Nonetheless, the Rome Statute has not been amended to include an annex prohibiting blinding lasers, and even if this weapons system were to be characterized as prohibited by customary IHL its use is not explicitly criminalized by the Rome Statute.

[582] With respect to war crimes alleging a violation of proportionality and distinction, it is unclear whether the Rome Statute requires the Prosecutor to prove actual knowledge or practical certainty that a military operation would cause loss of life or injury to civilians or damage to civilian property clearly excessive in relation to the military advantage gained or whether a negligence standard will suffice. The actual or subjective knowledge standard imposes a heavier burden of proof than an objective, negligence-based standard which imposes liability if commanders or soldiers were unaware of a substantial risk of harm but should have known that the attack would cause collateral loss of civilian life and damage to civilian property "clearly excessive in relation to the concrete and direct overall military advantage anticipated." Rome Statute, *supra* note 32, art. 8(2)(b)(iv).

[583] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14

ployed armed force against the territorial integrity and political independence of Uzbekistan in a manner inconsistent with the Charter of the United Nations,"[585] in derogation of the "independence and freedom of the Uzbeki people," and in contravention of the "clear pronouncement [established at Nuremberg] that aggressive war is a crime."[586] The indictment stated further that "the United States was not the victim of an armed attack and Operation Jeremiah was a *prima facie* act of aggression."[587] The Pre-Trial Chamber issued arrest warrants for all defendants,[588] and the Prosecutor forwarded copies to the Secretary of State[589] requesting cooperation in their arrest and

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(June 27) (holding that no customary IHL rule permits a state to self-defend absent an armed attack and that alarming military preparations undertaken by a second state justifies a report to the U.N. Security Council but not an act of anticipatory self-defense).

[584] *See* David, *supra* note 40, at 403-04 (stating that the risk to the United States of being subjected to charges of aggression before the ICC arises only "where the United States is acting unilaterally, eschewing resort to the mechanisms of the United Nations for reasons of expediency, or fear of insufficient international support"). Precedent bears out this assertion: when NATO employed force against the Federal Republic of Yugoslavia [hereinafter FRY] in 1999 absent U.N. Security Council authorization, FRY sued NATO members on ten separate counts in the I.C.J. alleging, inter alia, that the bombing was an illegal act of aggression. *See* Legality of the Use of Force (Yugo. v. U.S.), 1999 (June 2), *at* http://www.icj-cij.org (dismissing case for lack of jurisdiction). For a discussion of the cases, see Gerry Simpson, *The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power*, 11 EUR. J. INT'L L. 439 (2000).

[585] *See* UN CHARTER, *supra* note 53, art. 2(4) ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .").

[586] Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 1, 1 (1947). Although the Nuremberg defendants contended that positive IHL did not prohibit aggressive war and that the principle *nulla poena sin lege* ("no punishment without law") precluded trial on that charge, the IMT ruled against them. *See* International Military Tribunal, Motion Adopted by All Defense Counsel, Nov. 19, 1945, 1 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 168-70 (1945). Moreover, the chief prosecutor, Justice Robert Jackson, maintained that "[w]hile this law is first applied against German aggressors, . . . if it is to serve any useful purpose it must condemn aggression by any other nations . . . ." TAYLOR, *supra* note 13, at 11-12.

[587] David, *supra* note 40, at 395 (warning that the ICC may disagree with the United States as to the propriety of a particular use of force).

[588] *See* Rome Statute, *supra* note 32.

[589] *Id.* art. 58(1) (providing for issuance of arrest warrants by Pre-Trial Chamber upon application of Prosecutor).

surrender[590] "in accordance with Articles 87,[591] 89[592] and 93."[593]

The United States Ambassador presented this address the next morning in the U.N. Security Council:[594]

> It is my solemn duty to report that after the United States acquired clear and compelling information concerning plans by Al Qaeda, a terrorist organization aided and abetted by the Government of Uzbekistan,[595] to infiltrate the United States and attack our citizens with biological weapons, the President ordered United States Armed Forces to take preemptive measures to eliminate these weapons, which were stored in the Central Mosque. This defensive action, undertaken to prevent the deaths of millions of Americans, was clearly permissible under customary international law, as well as under the U.N. Charter [596] States and their citizens

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[590] *See id.* art. 91(1) ("A request for arrest and surrender shall be made in writing.").

[591] *See id.* art. 87(5) ("The Court may invite any State not party to this Statute to provide assistance . . . on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.").

[592] *See id.* art. 89(1) ("The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request . . . to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.").

[593] *See id.* art. 93 (creating obligations to assist the ICC in its investigation and prosecution, including with respect to production of persons and documents and access to victims and witnesses).

[594] No provision of the Rome Statute enables a requested State to set aside a request for the arrest and surrender of persons present within its jurisdiction, although Article 87(5) of the Report of the Preparatory Committee contained a provision to that effect. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.83/2/Add.1, at 135 (1998).

[595] *See* President George W. Bush, Address to the United Nations Security Council (Oct. 7, 2001) ("If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers themselves.").

[596] International law has long justified preemptive measures in defense of life and property. *See, e.g.,* HUGO GROTIUS, DE JURE BELLUM AD PACTUM 32, 75 (A.C. Campbell trans., 1901). However, the U.N. Charter narrowed the category of permissible acts of self-defense to those undertaken in response to an "armed attack" and excludes, or at least abridges, the natural right of self-defense subsequent to the moment the Security Council becomes seized of the matter. *See* UN CHARTER,

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art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, *until the Security Council has taken measures* necessary to maintain international peace and security.") (emphasis added); Yutaka Arai-Takahashi, *Shifting Boundaries of the Right to Self-Defence—Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INT'L LAW. 1081, 1809 (2003) (contending that once the Security Council assumes "primary responsibility" for the restoration of international peace and security, the right to self-defense under Article 51 lapses and the threatened state must subordinate its response to this mechanism, regardless of its efficacy). Some thus contend that preemptive measures are categorically prohibited and that a state must wait to be attacked prior to defending itself. *See, e.g.*, BERT V.A. ROLING, THE CURRENT LEGAL REGULATION ON THE USE OF FORCE 5 (1986) (positing the restrictive theory of self-defense); Lacey, *supra* note 476, at 308 ("Without the sine qua non of imminence, [preemptive] . . . self-defense becomes nothing more than the slippery slope of naked aggression."); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112 (1963) (advocating a restrictive interpretation of Article 51). Others argue that a state need not wait for its attacker to strike first but may, consistent with Article 51, preempt such an attack, on the ground that states possess the natural legal right to take necessary and proportional measures in self-defense. *See* William V. O'Brien, *Reprisals, Deterrence and Self Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 478 (1990) (supporting right of preemptive self-defense); Oscar Schacter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984). Moreover, as this permissive school asserts, the natural right to self-defend can be easily harmonized with the provisions of positive law by recognizing that, where the Security Council is unable or unwilling to take measures to that end, states are freed to pursue their own salvation. Lysobey, *supra* note 497, at 127. Because "analysis of the legitimacy of an act of preemption requires replacing the objectively verifiable prerequisite of an 'armed attack' with the subjective perception of a "threat" of such an attack in the sole judgment of the state believing itself about to be a target," preemptive self-defense has been a thorn in the side of IHL, and the UN, since the 1960s. *See* S.C. Res. 178, U.N. SCOR, 18th Sess., 1033d mtg. at 1, U.N. Doc. S/RES/178 (1963) (rejecting Protuguese claim of self-defense in the shelling of Senegal); S.C. Res. 487, U.N. SCOR, 36th Sess. 2288th mtg. at 10, U.N. Doc. S/RES/487 (1981) (rejecting Israeli invocation of Article 51 as basis for destruction of Iraqi nuclear weapons facility at Tamuz despite Israeli evidence that the reactor was to be used to make bombs to target Israel); G.A. Res. ES-6/2, U.N. GAOR, 6th Emer. Spec. Sess., Supp. No. 1, at 2, U.N. Doc A/ES-6/7 (1980) (rejecting invocation of Article 51 by Soviet Union as justification for invasion of Afghanistan). Similarly, the ICJ, in a much-criticized and cited opinion, has held that the legitimacy of a claim to self-defense rests upon and is "subject to the State concerned having been the victim of armed attack," thus seeming to rule out preemptive measures entirely. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 193-95 (June 27). State practice is inconclusive: he United States is one of the few states that openly embraces the right to preemptive self-defense. W. Hays Parks, *Memorandum of Law: Executive Order 12,333 and Assassination*, 1989 ARMY LAW. 4, 7. However, international terrorism, along with the proliferation of advanced and lethal weapons systems, has invigorated the debate. Because the

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threat posed by the use of WMD against civilian population centers is many orders of magnitude greater than the threat of conventional weapons used against military targets, and because terrorist attacks can materialize almost without warning whereas traditional military operations are transparent to a much greater degree, several scholars consider that impending terrorist WMD attacks can reasonably treated as imminent in circumstances where an attack by conventional means would not be so regarded. *See* Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm in Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 485 (1999) (arguing that when rogue states or terrorist groups possessed of WMD directly threaten the the survival of another state, the threatened state has the right to engage in "preemptive use of force to either deter acquisition plans, eliminate acquisition programs or destroy illicit WMD sites"); John Shaw, *Startling His Neighbors, Australian Leader Favors First Strikes*, N.Y. TIMES, Dec. 2, 2002, at A11 (quoting Australian Prime Minister Howard as stating that a politician would be "failing the most basic test of office" if he did not order preemptive action); Lacey, *supra* note 476, at 293-94 (arguing that "the threat [posed by terrorists with WMD] is simply too great for states not to act"); El-Ayouty, *supra* note 464, at 492 (stating that "in the case of universal and catastrophic terrorism . . . striking at the terrorists does not wait until a definite nexus is established between the terrorists and their actions."). Perhaps the most compelling version of this permissive interpretation of Article 51 is as follows:

> [C]ommon sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself. And, even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defence [sic] . . . [T]his view accords better with State practice and with the realities of modern military conditions than with the more restrictive interpretation of Article 51 . . . .

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994), *cited in* Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 15 (2003). In sum, the permissive interpretation would permit a state to resort to preemptive self-defense provided it has:

> (1) reasonably determined that [WMD] . . . are to be used as an aggressive force against it; (2) affirmatively pursued alternative modalities of resolution and remained engaged in the diplomatic process until the ultimate moment of action; (3) acted only after the aggressor's conduct has coalesced into a coherent . . . threat; and (4) achieved minimal destruction, using only as much force as necessary to effectively eliminate the threat.

Mark E. Newcomb, *Non-Proliferation, Self-Defense, and the Korean Crisis*, 27 VAND. J. TRANSNAT'L L. 603 621 (1994) (building upon an earlier formulation in YORAM DINSTEIN, AGGRESSION AND SELF-DEFENSE 165-90 (1988)). Arguably, where the U.N. takes no action in response to a request from a threatened state, or moves too slowly to neutralize the threat, the threatened state has the natural right, as well as a right under Article 51, to take military action unilaterally or in concert with others. Moreover, with respect to terrorists in possession of WMD, it is arguable possess the inalienable right to life,[597] and to defend life.[598] When a terrorist organization couples hostile intent[599] with the means to execute that intent, neither the United States nor any other peaceful state need wait to be devastated before responding.[600] Although the United States delayed action for

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that the Security Council, with Resolutions 1368 and 1373 recognizing the inherent right ot self-defense and authorizing the exercise of this right against terrorists on the territory of states unable to prevent terrorist attacks, has accepted the permissive interpretation and pre-authorized preemption. Arai-Takahashi, *supra*, at 1087. However, the law has been slow to respond, and the U.N. Charter, because of its susceptibility to interpretation as a categorical prohibition on self-defense except in the aftermath of an armed attack, presents a formidable legal obstacle to the application of customary doctrine. Moreover, the lawfulness of specific acts of preemptive self-defense often does not become apparent until long after the fact when information, tightly held by states, surfaces. *See* Reisman, *supra* note 108, at 17-18 (stating that, whereas most scholars condemnded the 1981 Israeli attack on the Iraqi reactor, in light of the discovery that Iraq had an advanced WMD program in 1991, "now the general consensus is that it was a lawful and justified resort to unilateral, preemptive action"). Thus, in conjunction with the precedent of Nuremberg and the expansive powers of the ICC to define aggression, individuals who order or participate in preemptive self-defense in the War on Terror may incur criminal liability. *See, e.g.*, FRANCIS A. BOYLE, THE CRIMINALITY OF NUCLEAR DETERRENCE (2002) (equating United States preemptive strike in Afghanistan with Nazi "self-defense" argument and contending that the Bush Doctrine is the primary reason for United States opposition to the ICC). In sum, the legitimacy of preemption remains an open, political, question, and the prospect that an ICC Prosecutor might deem a particular exercise of preemption a crime within ICC jurisdiction is a real possibility. David, *supra* note 40, at 393.

[597] *See* Lacey, *supra* note 476, at 294 (arguing that the legal justification for preemptive self-defense should be the argument that states have an inherent *juris ad vitae* ("right to life") that "prevents the random annihilation of their populations from weapons of mass destruction in the hands of unstable regimes or the murder of their citizens by rogue terrorist bands").

[598] As the I.C.J., presented with the question whether a threatened state could lawfully use nuclear weapons where its survival was at issue, could not reach a definitive conclusion, the position that a state may use less destructive means to protect against its eradication is, at the very least, a good-faith legal argument. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 266 (July 8) ("[T]he court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence [sic], in which the very survival of a State would be at stake.").

[599] The Department of Defense defines "hostile intent" as "[t]he threat of imminent use of force against the [U.S.], U.S. forces, . . . U.S. nationals and their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property." CJCSI 3121.01A, *supra* note 511, at A-5.

[600] President George W. Bush, State of the Union Address (Jan. 28, 2003), *at* http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html ("Since when have terrorists . . . announced their intentions, politely putting us on notice be-

> several months to pursue peaceful modalities of resolution in this august body, diplomacy failed.[601] While the risk in waiting was patently obvious, wait we did, until terrorist attack was imminent and the slightest further delay would have jeopardized the lives of millions of innocent men, women and children. The last resort is always the stark reality of armed force, which the United States was morally obligated to employ to protect its people.[602] To brand our response an unlawful act of aggression is an ill-considered measure that simply obliterates the distinction between terrorism and self-defense.[603] Some may question the factual predicate that gave rise to the decision to employ measures of self-defense to

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fore they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and recriminations would come too late.").

[601] A number of scholars center their post-hoc analysis of the legitimacy of preemptive self-defense on the question of whether the threatened state sought the assistance of the Security Council. For this bloc, where a state seeks such assistance but is offered none, whether through the political paralyis of that body or some other unjustifiable delay, the threatened state is tacitly granted authorization to act unilaterally and preemptively. *See, e.g.*, David, *supra* note 40, at 402 (suggesting that failure to resort to the Security Council for assistance in reducing a threat attenuates the strength of a subsequent claim of legal legitimacy for an act of preemptive self-defense); W. Thomas & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense*, 75 VAND. J. TRANSNAT'L L. 417, 427-28 (1982) (stating that legitimate claims to preemptive self-defense require as conditions precedent the unsuccessful referral of the matter to the Security Council and pursuit of "peaceful modalities of resolution," including mediation and diplomacy). However, not all commentators that support the right of states to undertake self-help following failed resort to the Security Council concur that such resort will "obviat[e] the need for force . . . and . . . eliminate the risk to civilians." David, *supra* note 40, at 402.

[602] Liberal democratic social theory holds that the most important function of government is ensuring the physical safety of the governed, and international law will be interpreted by democratic governments to support this mission. *See* Lacey, *supra* note 476, at 313 (contending that states, as a creation of social contract, are obligated to protect their citizens from harm emanating from outside their boundaries and that "regardless of how international law describes the use of force against a . . . target, . . . [the] state will continue to fulfill its duties to its citizens"); Reisman, *supra* note 82, at 89 ("[A] government in a functioning democracy whose population faces such violence will not last long if . . . it tells its electorate that international law prevents it from taking . . . preemptive action.").

[603] *See* John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 HASTINGS INT'L & COMP. L. REV. 241, 241 (1994) (suggesting that the distinction between self-defense and reprisal is disappearing under a scholarly assault upon the principle of anticipatory self-defense).

preempt the terrorist threat. When the United States determines it is possible to share some or all of the sensitive intelligence that prompted the military response without compromising its national security, it will do so.[604] In the interim, the ICC ought never to permit military operations conducted in good-faith to be the germ of criminal prosecutions which would disclose to our enemies the process whereby sensitive sources and methods of United States intelligence operations lead to the development and implementation of military options.[605]

Moreover, Operation Jeremiah was planned and conducted with great care to minimize casualties to innocent civilians and civilian property, as are all United States military operations.[606] The United States deeply regrets the loss of innocent civilian lives, as well as the destruction of the Central Mosque. It is unnecessary to reenter the divisive debate over the legal force or the wisdom of the Additional Protocols[607] to conclude that in choosing a perfidious and dishonorable strategy, the terrorists and their state sponsors, and not the United States, made of the Central Mosque, a cultural treasure otherwise entitled to the broadest degree of immunity, a legitimate military target[608] In striking this target, which

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[604] A state may refuse to cooperate with an order or measure of the ICC on the basis of "an existing fundamental legal principle of general application." Rome Statute, *supra* note 32, art. 93(3). Articles 72 and 93(4)-(6) permit a state to refuse assistance if the request concerns the production of any document or disclosure of evidence that relates to its national security. *Id.* arts. 72, 93(4)-(6). States are inclined to be reluctant to comply with requests for assistance with the prosecution of their own nationals, particularly if the requested assistance concerns divulging classified military matters or national intelligence product. Bert Swart & Garan Sluiter, *The International Criminal Court and International Criminal Co-operation*, *in* REFLECTIONS, *supra* note 32, at 119. However, the ICTY has ruled that state obligations to cooperate with international tribunals are extensive and that "[t]o admit that a State holding [documents concerning military operations] could lead to the stultification of international criminal proceedings," thereby undermining the "very raison d'etre of [international criminal tribunals]." Prosecutor v. Blaskic, 1997 I.C.T.Y. IT-95-14-AR-108, ¶ 65 (Oct. 29) (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997). Whether the ICC would follow this precedent is uncertain; however, if it concludes that an invocation of Article 93(4) as grounds to refuse a request is not in accordance with obligations under the Rome Statute, the ICC may refer the alleged breach to either the Assembly of States Parties or, in the case of non-parties, the Security Council. Rome Statute, *supra* note 32, art. 93(4). In other words, United States unwillingness to share sources and methods with the ICC might lead to a Security Council vote on whether the United States has a duty to share national security information with potential adversaries.

[605] Some commentators suggest that the U.S., as a precondition to ICC membership, seek and receive the assurance that military operations based upon sensitive intelligence sources and methods are not criminalized in exchange for a solemn representation that its military operations will be predicated upon a good-faith belief in the legitimacy of the same. *See, e.g.*, Ruth Wedgwood, *Speech Three: Improve the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT?, *supra* note 35, at 67-68 (arguing further that "[g]ood faith differences in military doctrine should be argued in military journals and the public press, not in a criminal courtroom").

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[606] *See* Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 62 (1996) ("In combat the goal of the United States forces is always to minimize civilian casualties. . . ."); *see also* U.N. Security Council, Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001) ("In carrying out these [military] actions [against the Taliban regime and al Qaida], the United States is committed to minimizing civilian casualties and damage to civilian property.").

[607] Although a number of militarily significant states have not ratified either of the Protocols Additional, several scholars, as well as many human rights NGOs and at least one international tribunal, contend that API and APII in their totality have reached the status of customary IHL and are thus binding even upon non-parties. *See, e.g.,* Frits Kalshoven, Prohibitions or Restrictions on the Use of Methods and Means of Warfare, in The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective 97, 99 (Ige K. Dekker & Harry H.G. Post eds., 1992); Stefan Oerter, *Methods and Means of Combat, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 111-13 (Dieter Fleck ed., 1995); Prosecutor v. Tadic, 1995 I.C.T.Y. IT-94-1-AR-72, ¶ 117 (Oct. 2) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ("Many provisions of [the Protocols Additional are now] declaratory of existing rules or . . . [have] crystallised [sic] emerging rules of customary law or else . . . [have] been strongly instrumental in their evolution as general principles."). However, the drafters of the Rome Statute could not reach an agreement as to whether some or all of contents of the Protocols Additional have risen to level of CIL. BASSIOUNI, *supra* note 34. Several major military powers, including the U.S., have either refused to ratify the Protocols Additional or have entered extensive reservations, contradicting the claim to status as customary IHL. Parkerson, *supra* note 511, at 51. The official position of the U.S., which has signed but not ratified either instrument, maintains that, while various provisions of the Protocols Additional, such as the principle of distinction in targeting set forth in Articles 48 and 49 of API as well as the principle of proportionality codified at Article 57 of API, are expressive of customary IHL, many others are not, including, inter alia, restrictions in Article 56, API, and Article 16, APII, on attacks against civilian facilities converted to military use, the blurring of the distinction between combatants and noncombatants, the presumption of the civilian character of facilities, the abdication of the responsibility for protecting civilians on the part of defending forces, and the relaxing of other obligations. *See* George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 12 (1991) (noting statements of understanding offered by the United States Delegation during the negotiation of API); Letter of Submittal from Secretary of State George P. Shultz, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 11th Sess., at VII, IX (1987) (enumerating Department of Defense objections, including

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that the Protocols "grant[] guerrillas a legal status that often is superior to that accorded to regular forces, ... unreasonably restrict[] attacks against . . . legitimate military targets, . . . [and are] too ambiguous and complicated to use as a practical guide for military operations"). Moreover, for the United States and several other advanced military powers, the Protocols Additional are less a serious attempt to regulate armed conflict than an incorporation of the "political and propagandistic goals of certain delegations, and a number of the Protocol's provisions simply cannot be reconciled with the basic realities of military strategy and tactics." Roberts, *supra* note 15, at 168.

[608] Terrorists, along with rogue states, have made a practice of siting weapons and forces in and in close proximity to sites legally protected under IHL, including hospitals, religious buildings, and archaelogical sites, "precisely to make public charges of indiscriminate use of force and of war crimes to the international community through the mass media." Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War*, 86 CAL. L. REV. 939, 988 (1998). This strategy is intended to confer a degree of immunity upon defenders, for some attackers are loathe to attack churches, medical institutions, and cultural monuments, while some commentators dispute the notion that such facilities can ever be construed to make an "effective contribution to military action" despite their investiture with troops or war materiel. *See* KALSHOVEN, *supra* note 28, at 89-90 (positing a broad view of the protections due to categories of facilities). However, defenders who elect this strategy present attackers with factual circumstances that support the legal argument that sites invested with military significance are thereby divested of their immunities as civilian facilities. *See* API, *supra* note 105, art. 52(2), (3) (limiting attacks to "military objectives," defined as "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, . . . offers a definite military of advantage" and providing that doubts as to whether an object is a military objective are to be resolved in favor of a determination of civilian status); Hague Convention of 1907, *supra* note 96, art. 27 (permitting attacks against civilian facilities stripped of civilian character by virtue of their use by the enemy in support of the military effort).

From the United States perspective the question of whether a facility is a legitimate military objective is ultimately a fact-intensive inquiry, and where attackers discover that an otherwise-immunized facility has been converted by defenders to the "efficient conduct of hostilities and minimization of their casualties," attackers are not likely to presume the contrary to their peril. Roberts, *supra* note 15, at 150 (warning of "dire consequences" for attackers who refuse to engage such targets). During the negotiation of API, the United States Delegation made numerous statements regarding their understandings of the text, including, inter alia, 1) that Article 52 prohibits only those attacks directed against nonmilitary objectives and does not prohibit incidental collateral damage resulting from attacks on military objectives; (2) that if cultural objects and places of worship

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protected by Article 53 are used in support of the military effort they lose the special protection of that article; (3) that in relation to Articles 51-58, commanders and others responsible for planning, ordering, or executing attacks necessarily must reach decisions on the basis of information available to them at the relevant moment of decision, rather than in hindsight. Aldrich, *supra* note 608, at 18. The United States made similar expressions of understanding with respect to APII that indicated that "[t]he United States understands that Article 16 [of APII] establishes a special protection for a limited class of objects that, because of their recognized importance, constitute a part of the cultural and spiritual heritage of people, and that such objects will lose their protection if they are used in support of the military effort." State Department Report Submitted to President Reagan, S. Treaty Doc. No. 2, at 7 (1987). Thus, according to the U.S., where defenders, who share with attackers responsibility for reducing the risks faced by civilians, unilaterally strip otherwise protected sites of their immunity, these sites, whether they be schools, nuclear plants, hospitals, or mosques, are by their actions converted into legitimate military targets. *See* Aldrich, *supra* note 608, at 12 (stating that attacks against otherwise protected nuclear generating stations are permitted as militarily necessary where such stations are furnishing power to military facilities or used for weapons research or stockpiling); Meron, *supra* note 12, at 277 (contending that targets with a generally civilian character may be lawfully attacked if they meet the definition of military objective under API, art. 52(2)); U.S. Dep't of Defense, Report To Congress On The Conduct Of The Persian Gulf War—Appendix on the Role of the Law of War, 31 I.L.M. 612, 627 (1992) (stating unequivocally that, when civilian structures are invested with weapons or defending troops, these structures become legitimate military targets under the rule of military necessity); U.S. Dep't of Air Force, International Law—The Conduct of Armed Conflict and Air Operations, AFP 110-31, at 5-11 (1976) [hereinafter AFP 110-31] (same). Some, including a number of NGOs, contest the United States interpretation, suggesting that enumerated categories of facilities can never be divested of civilian character. *See, e.g.*, Civilian Deaths in the NATO Air Campaign 12 Human Rts. Watch (2000), *at* http://www.hrw.org/reports/2000/nato/ index.htm (charging NATO targeting of bridges and communications used by Yugoslavia in support of war effort against NATO as war crimes in violation of targeting restrictions imposed by Articles 51-58, API). These redefinititions of legitimate military targets, posited by what one commentator terms an "extreme" and "fringe" group, are influencing international jurisprudence. Jeanne Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. Rev. 143, 164-65 (2001). However, if, as the United States and other states contend, the Protocols Additional, particularly Articles 51-58, are not yet expressive of customary IHL, the United States position is a permissible interpretation of the sole applicable IHL instrument governing restraints on targeting, the Hague Regulations of 1907, which are silent with respect to the targeting of particular categories of facilities. Whether the deliberate targeting of civilians to shatter enemy morale is permissible under the Hague Regulations is beyond the scope and purpose of this Article; it suffices to note in passing that the United States Air Force answers the question in the affirmative. *See* Meyer, *supra*, at 172 (stating that current Air Force doctrine "clearly recognizes and allows for . . .

> made direct and significant contribution to the military operations of al Qaida and Uzbekistan, it appears that some of the biological weapons stored within leaked from that site, causing civilian injury and death, despite the fact that the United States took great precautions, including the use of a ground-based assault rather than aerial bombardment, to avoid this.[609] Some, including the ICC Prosecutor, intimate that the failure to warn the Government of Uzbekistan of our impending military action prevented the evacuation of civilians and thus constitutes a crime. Had it been possible to provide warning without jeopardizing the mission, we would have done so.[610] Unfortunately, because al Qaida intended to

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choosing targets that also affect the enemy's will and morale, both of their military forces and their civilian population").

[609] Although the API proscribes attacks against targets likely to release "dangerous forces" for the sole purpose of killing civilians via such release and requires attacking parties to take "all practical precautions" to avoid the escape of "dangerous forces" from targets likely to release such forces, it does not categorically proscribe attacks on such targets, nor does it define what sort of measures are within the bounds of the practical. API, *supra* note 105, art. 56. By selecting those tactics and weapons most likely to minimize the release of dangerous forces and providing warning where possible, attacking forces are most likely to substantiate the claim that they have taken "all practical precautions." Parkerson, *supra* note 511, at 62; *see also* API, *supra* note 105, art. 51(4)(c) (proscribing methods and means of attack that cannot be controlled sufficiently to protect civilians from injury). In comparison to aerial bombardment, which requires significantly more ordnance and increases the potential for errant targeting and collateral damage, a ground assault, while more dangerous to attacking forces, permits the surgical application of force and enhances opportunities to limit collateral damage. *See* Lewis, *supra* note 523, at 489 (noting that only when the the Secretary of Defense and the Chairman of the Joint Chiefs of Staff were assured that Iraqi BWs could be targeted by air without significant civilian casualties was the order given to do so with incendiary weapons); Michele L. Malvesti, *Bombing Bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER F. WORLD AFF. 17 (2002). Thus, the U.S., by employing SF to eliminate BWs in the Central Mosque, would arguably be judged by an independent reviewer to have taken "all practical precautions" in preventing collateral damage. *See* MICHAEL IGNATIEFF, VIRTUAL WAR: KOSOVO AND BEYOND 214-15 (2000) (arguing that use of ground forces to eliminate a target, rather than standoff weapons, is far more likely to guard against the "moral danger" of avoiding risk to one's own forces while enhancing risks to noncombatants).

[610] Assault confers upon attacking forces the tactical advantage of surprise, which is lost when a defender gains prior warning and is able to prepare defenses, and, in relevant circumstances, even relocate WMD. Parkerson, *supra* note 511, at 49. IHL concedes that military necessity may require attacking forces to attack without warning. Article 26 of the Hague Regulations of 1907, *supra* note

immediately transfer the weapons for use against the United States, it was not. Nonetheless, and consistent with the felony murder doctrine in common-law,[611] the ultimate authors of death and destruction associated with Operation Jeremiah are al Qaida and Uzbekistan, who chose to deliberately site prohibited weapons of mass destruction in a crowded urban area in a cowardly attempt to shield themselves and their weapons from attack.[612]

Not only does the United States lack responsibility for civilian casualties associated with Operation Jeremiah, but the mere fact that a great number of civilians perished during

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410, obligates attacking forces, where circumstances permit, to grant advance warning of an intended assault in order to permit the evacuation of civilians from the target area; the development of state practice since 1907 indicates that derogation is permitted where "circumstances do not permit advanced warning." OPPENHEIM, *supra* note 309, at 420. Similarly, Article 57(2)(c) of API provides that "[e]ffective advance warning shall be given of attacks which may affect the civilian population, *unless circumstances do not permit.*" (emphasis added). United States practice reinforces the conclusion that the obligation to grant warning is limited: paragraph 43(c) of FM 27-10 limits circumstances in which a warning is required to those "whe[re] the situation permits," and United States forces have withheld warnings in recent operations on the ground that to have issued warnings would have increased casualties to attacking and defending forces as well as to civilians. *See* Parkerson, *supra* note 511, at 48-50 (discussing legal questions related to warnings to defending forces during Operation Just Cause in Panama (1989)).

[611] The felony murder doctrine, developed at common-law and codified in several States, provides that any death which occurs during the commission of a felony is first degree murder, and all participants in that felony or attempted felony can be charged with and found guilty of murder. *See* IND. CODE § 35-42-1-1 (Supp. 2002) ("A person who . . . kills another human being while committing or attempting to commit [a felony] commits murder . . . .").

[612] API obligates the defending party "to the maximum extent feasible" to remove civilians from the area of military objectives, to locate such objectives away from densely populated areas, and to take other precautions to protect civilians. API, *supra* note 105, art. 58(a). Even more pointedly, Article 51(7), along with Article 28 of GCIII, imposes a duty upon the defender to avoid using civilians to shield military objectives. API, *supra* note 105, art. 51(7); *see also* GCIII, *supra* note 398, art. 28 (providing that civilians may not be used to render an area immune). Thus, when defending forces fail to remove civilians from the area of military objectives, resulting civilian casualties are arguably attributable to this breach of the defender. *See* AFP 110-31, *supra* note 609, at 5-13 ("A party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in their territory.").

and subsequent to the United States military attack does not support the conclusion that the United States is responsible for any crimes. Although the United States accepts a customary obligation to adhere to the doctrines of proportionality and distinction in the conduct of its military operations and to use its best efforts to limit and prevent civilian casualties,[613] it is or should be patently obvious that the United States neither targeted civilians nor intended that civilians become casualties of Operation Jeremiah, which was directed solely against the weapons of mass destruction in the hands of terrorists and their rogue state sponsor. Civilian casualties are, tragically, an inevitable concomitant of armed conflicts conducted in urban areas.[614] For this reason, proportionality is not an element in the charge of a crime against humanity, which imputes the intentional targeting and not the inadvertent killing of civilians,[615] nor is there a magic formula that can be fairly applied post-hoc to answer the subjective question of whether civilian casualties are disproportionate to the military advantage gained by a legally permissible attack preceding those casualties,[616] or otherwise great in comparison to resulting military casualties.[617] To the extent that any parties were in a privileged position to prevent civilian casualties, that distinction is reserved to al Qaida and Uzbekistan, which, rather than exploit ambiguities in the laws of war to support their propagandistic claims that the United States has engaged in an indiscriminate attack, might have evacuated their prohibited weapons and relocated innocent civilians but chose, for political purposes, another course of conduct.[618] This is not the first time terrorists have cynically manipulated civilian populations, nor will it be the last.[619] However, to "resort to counting bodies and placing

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[613] In upholding obligations under proportionality and distinction to minimize incidental loss of civilian life, military planners consider a wide range of factors, including 1) the military importance of the target or objective, 2) the density of the civilian population in the target area, 3) the likely incidental effects of the attack, including the possible release of hazardous substances, 4) the types of weapons available and their accuracy, 5) whether the defenders are deliberately exposing civilians or civilian objects to risk, and 6) the mode and the timing of the attack. However, in so doing, military planners are hampered by imperfect information, the fog of war, the imperative of military necessity, and the need to make rapid decisions. Commentators attempting to establish the legal standard under which to impose liability upon belligerents for violations of IHL committed in the process of target selection and mission tailoring offer what is essentially a gross negligence, rather than an absolute liability, standard, suggesting that the relevant question to be asked and answered after the fact is whether a "normally alert attacker who is reasonably well informed and who ma[de] reasonable use of the available information could have expected the excessive damage among the civilian population" in prosecuting an attack against a given target with the means and methods selected. Kalshoven, *supra* note 28, at 99-100. Determination of liability under a negligence standard thus is a factual question which rests upon an assessment of the information actually or reasonably available to the attacker at the time the decision was made to target a given site with particular means and methods. *See* David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense and State Responsibility*, 16 YALE J. INT'L L. 245, 366-74 (1992) (discussing application of negligence standard to assess liability for deaths of civilians resulting from the mistaken targeting of a civilian airliner believed to be a military aircraft).

[614] *See* DEP'T OF DEFENSE, REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR—APPENDIX ON THE ROLE OF THE LAW OF WAR, 31 I.L.M. 612, 624 (1992) (concluding that civilian casualties are inevitable in modern military operations); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offence*, 7 DUKE J. COMP. & INT'L L. 539 (1997) (same).

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[615] Whereas crimes against humanity implies intentional targeting of civilians, the war crime of committing an unlawful attack envisages circumstances where unintended civilian deaths or injuries result in the course of an attack against a legitimate target. *See* Rome Statute, *supra* note 32, art. 8 (creating liability solely for the intentional commission of enumerated crimes against civilian victims in violation of the principle of distinction but maintaining silence with respect to the principle of proportionality); *cf. id.* art. 8 (note); Fenrick, *supra* note 12, at 783 (arguing against expansion of conceptual definition of crimes against humanity to incorporate the crime of creating disproportionate civilian casualties during an attack on the ground that to do so could theoretically criminalize the conduct of all soldiers, depending upon how proportionality is determined, and thereby remove legal incentives for moderation during armed conflicts).

[616] *See* Parkerson, *supra* note 511, at 59 (noting that although the general principles of distinction and proportionality elaborated in API are "unobjectionable as customary [IHL] . . . [a]ssessing what is the 'concrete and direct military advantage anticipated,' the 'incidental loss of civilian life, injury to civilians or damage to civilian objects' that may be expected, or the ratio between the two *prior* to attack is an extremely difficult, if not impossible, task to perform with any degree of certainty"). Several states and commentators challenge Article 51(4)(c) of API as constituting a "radical revision of the inherited principle of distinction" in that it would not permit the continued immunization of attacks not intentionally directed against civilian targets where such attacks employed "method[s] and means of combat" that had the effect of causing disproportionate civilian casualties. *See* Dawes, *supra* note 222, at 242-43 (rejecting the substitution of a proportionality determination, assessed by an evaluation of the method and weapons employed in an attack, for the intent of the combatant as the relevant evidence in determining compliance with the principle of distinction). Other commentators, favoring the modifications of API, have operationalized legal obligations under the principles of proportionality and distinction by suggesting that the two are so interrelated that, although adherence to the principle of distinction does not require that an attack produce no civilian casualties, an attacker must simply strike a balance between the value of the military advantage gained and the collateral damage produced—in other words, distinction drops away (save for those cases involving the intentional targeting of civilians) and what is left is simply that the attacker not violate the principle of proportionality by using excessive force or by using particular weapons systems where less lethal alternatives are available. *See, e.g.*, Belt, *supra* note 42, at 148; Parkerson, *supra* note 511, at 62 (indicating that some adherents to this position consider that the United States doctrine of "'highly sophisticated weaponry and tactics to present an overwhelming superiority of firepower that would make any resistance unthinkable,' unnecessarily cause[s] civilian casualties and therefore [ipso facto] violate[s] the proportionality principle); Belt, *supra* note 42, at 173 (reporting arguments

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that the United States practice of employing precision-guided munitions [hereinafter PGMs] over the last ten years has modified the meaning of proportionality to require the use of PGMs in urban areas). In sum, determination of proportionality is an inherently political exercise, since the value of a military objective, as well as how many civilian casualties are necessary to constitute "unduly severe losses," is a function of interests rather than law.

[617] Americas Watch, a human rights NGO, has intimated that it is possible to draw inferences as to United States compliance with the principles of distinction and proportionality by comparing the number of civilian dead resulting from a United States military operation to the number of casualties suffered by attacking United States forces. *See* Parkerson, *supra* note 511, at 61 n.155 (decrying the use of this compliance determination protocol by Americas Watch as a "macabre and distorted method of viewing proportionality"). The unstated assumption is that some proper proportion of military casualties to civilian casualties exists against which United States operations can be assessed for compliance with IHL and that insufficient military casualties permit the inference that an operation was not sufficiently protective of civilians. *Id.* Unsurprisingly, this view is diametrically opposed by the view that in evaluating compliance with the principle of proportionality by assessing whether the degree of force used was necessary to accomplish a legitimate military objective, "we are entitled to take into account not only the force needed to subdue the military force of the enemy, but also the danger posed to our [U.S.] forces, when proceeding to subdue the enemy force, within the framework of the military action of defending against [the enemy.]". Gross, *supra* note 87, at 237.

[618] *See* Parkerson, *supra* note 511, at 59 ("[P]rior to attack, the attacking commander knows much less than the defender about the location of civilians[,] . . . [and] [t]herefore the emphasis in Protocol I on placing the primary responsibility for minimization of incidental civilian casualties upon the attacker, rather than upon the more informed defender . . . encourag[es] defenders to charge 'indiscriminate attack' and to call for analysis of attack results without consideration of the cause of those casualties, thereby exploiting civilians for tactical and propaganda purposes.").

[619] *See* O'BRIEN, *supra* note 339, at 123 (stating that United States violations of proportionality and distinction in Vietnam was "in substantial measure the result of deliberate Communist policies of using the population as a shield[,] [as] [o]ften it was impossible to get at the enemy without risking disproportionate and

monetary values on destruction and then applying a 'but for United States intervention this would not have occurred' kind of formula"[620] to find a violation of the laws of war is as much a perversion of the law as it is of the facts and of the requirements of justice, and is beneath the dignity of this institution.

Furthermore, the most basic conceptions of morality and law rail at the notion that terrorists, a group beyond the pale of the law,[621] can don civilian garb and hug the civilian population to make themselves invulnerable,[622] but the al Qaida terrorists, who know that the United States Armed Forces are populated with decent individuals who recoil at the thought of pressing an attack likely to result in civilian casualties, capitalized upon the moral and ethical distinction between themselves and our soldiers by electing the criminal strategy of fighting in civilian clothing and taking women and children hostage in direct violation of the international law.[623] That

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indiscriminate actions.").

[620] Parkerson, *supra* note 511, at 139-40.

[621] Traditionally, terrorist groups did not come within the application of IHL, a regime framed in contemplation of wars between regular military forces; terrorists were classed as common criminals. *See generally* KWAKWA, *supra* note 3.

[622] Quoting WALZER, *supra* note 12, at 195. Terrorists are heavily reliant upon secrecy and surprise, and largely immune from considerations of ethics and morality. Baxter, *supra* note 12, at 328. To maximize secrecy and minimize the risk of drawing hostile fire, terrorists often site their operations within densely populated civilian centers in the expectation that their adversaries will be loathe to attack them for fear of creating incidental civilian casualties and arousing condemnation. *See* WALZER, *supra* note 12, at 180 ("If you want to fight against us, the [terrorists] say, you are going to have to fight civilians . . . Therefore, you should not fight at all, and if you do, you are the barbarians, killing women and children."). Although the practice is contrary to law and hostile to the civilian populations wherein they take refuge, and although the United States does not succumb to the urge to violate distinction in order to counter the strategy, terrorists' refusal to distinguish themselves from civilian populations "invites enemies to attack civilians because the civilians might be [terrorists] in disguise." Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 929 (1994).

[623] The taking of civilian hostages as human shields to protect against enemy fire is categorically prohibited by GCIV as a grave breach. *See* GCIV, *supra* note 398, art. 34. A determination of the legal ramifications of the wearing of civilian clothing into battle requires deeper analysis, although the Geneva Conventions do not treat the wearing of civilian clothing into combat as a grave breach. *See* GCIII, *supra* note 398, art. 130 (enumerating grave breaches and providing that the perfidious wearing of enemy uniforms, but not the wearing of civilian clothing

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per se, constitutes a grave breach). Still, to preserve the capacity for belligerent forces to distinguish between combatants and noncombatants and thereby uphold obligations under the principle of distinction, IHL has long required combatants, as a matter of custom, to dress so as to distinguish themselves from the civilian population and permit enemy forces to clearly identify permissible, and impermissible, targets. *See* U.S. DEP'T OF ARMY, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, DAP 27-1-1, at 138 (1979) [hereinafter DAP 27-1-1] (noting that customary IHL requires those claiming entitlement to belligerent status upon capture to be under the command of a responsible commander, *to wear a fixed, distinctive sign recognizable at a distance*, to carry arms openly, and to conduct operations in accordance with IHL). The positive rules of IHL reinforce this custom by stripping the benefits to which POWs are entitled upon capture from belligerents who do not conform to these requirements by, e.g., fighting out of uniform. *See* GCIII, *supra* note 398, art. 4(a)(2) (codifying customary IHL with respect to the elements of conduct required of belligerents to maintain their entitlement to status as POWs, immune from trial for acts of lawful belligerency, upon capture); GCIII, *supra* note 398, art. 85 (entitling POWs to protections of the GCs even if prosecuted for pre-capture offenses). Under the Geneva Conventions, even as modified by the Protocols Additional, terrorists, who adhere to none of these obligations, are thus common criminals not entitled to POW status upon capture and may, in contrast to POWs, be tried as unlawful combatants under the domestic law of the detaining state. Baxter, *supra* note 12, at 338 (explaining that this legal status extends to spies, saboteurs, guerrillas and all others who fail to meet the conditions established under international law for favored treatment upon capture by "engag[ing] in hostile conduct without meeting the qualifications established by Article 4 of the [GCs]"); *see also id.* at 328 (stating that such unlawful belligerents are "subject to the maximum penaltiy which the detaining belligerent desires to impose"); API, *supra* note 105, art. 44 (providing that combatants who do not carry arms openly while preparing for or engaging in hostilities are acting perfidiously and thus disentitle themselves to POW status upon capture and may be tried under the domestic law of the capturing state). The same is true of civilians who take up arms without donning a uniform: they lose their protected status under IHL and become combatants, albeit unlawfully, and thus legitimate targets as well as the legitimate subjects of post-capture judicial proceedings. *See* GCIV, *supra* note 398, art. 4(a)(2) (defining noncombatancy and enumerating categories of noncombatants, including civilians, soldiers rendered hors de combat by wounds or capture, and medical personnel); *id.* art. 5(3) (stripping protections as noncombatants from civilians who take up arms); API, *supra* note 105, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."); RAMSEY, *supra* note 45, at 435-36 (explaining that "'combatant' means anyone who is an actual bearer of the force one seeks to repress by resorting to arms"). This is true without regard to the age or sex of the civilian who becomes an unlawful combatant. ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 148 (1994) (noting that even women and children lose their protected status under IHL when they render military assistance to a belligerent). The question of whether providing material support to a belligerent without actually taking up arms, whether by destroying enemy property, providing intelligence support, or in some other fashion, converts a civilian

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out of uniform into an unlawful combatant is a relevant issue beyond the scope of this Article. *See* Lisa L. Turner & Lynn G. Norton, 51 A.F. L. REV. 1, 26-28 (2001) (arguing that the answer must be judged on a "case-by-case basis"); Faculty, The Judge Advocate General's School, *United Nations Convention on the Safety of United Nations (UN) and Associated Personnel Enters into Force*, 1999 ARMY LAW 21, 27 (arguing that civilians forfeit immunity from attack "whenever they take any action intended to cause actual harm to the personnel and equipment of an armed force."); *but see* ICRC, COMMENTARY ON THE GENEVA CONVENTION (IV) 51 (Jean S. Pictet ed., 1952) ("Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by [GCIII], a civilian covered by [GCIV], or again, a member of the medical personnel of the armed forces who is covered by [GCI] . . . Nobody in enemy hands can be outside the law."). Similarly, disagreements over the provisions of API which create a presumption of civilian status is beyond the current scope, as is the current controversy over whether the designation by the Bush Administration of individual belligerents captured in the War on Terror as "unlawful combatants" creates a separate juridical status of persons not privileged either as civilians or as lawful belligerents to whom the protections of the GCs are not available. *See* API, *supra* note 105, art. 50 (defining as a civilian a person who "does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of [GCIII] and in Article 43 of this Protocol" and providing that "[i]n case of doubt . . . that person shall be considered a civilian").

Although the requirements that must be met to entitle an individual to treatment as a lawful belligerent upon capture were fairly well-settled under the Geneva Convention, API unsettled this body of law, and the requirements that would-be lawful combatants must uphold during a "military deployment preceding the launching of an attack" are now the subject of heated contestation. Article 44 of API provides that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack," but Article 43 eliminates part of the juridical distinction between soldiers and civilians by deleting the requirement that irregular forces wear a distinctive symbol and providing that irregular forces are lawful combatants if they meet the lesser obligations of organization under a responsible commander, adherence to IHL, and a relationship to "a Party to the conflict." API, *supra* note 105, art. 43. These two articles have been roundly condemned for blurring the principle of distinction between combatants and noncombatants and permitting interpretations of its text that would unilaterally allow "guerrillas" to disguise themselves as civilians, hide amongst civilian populations until just before the moment of an attack, produce insignia and weapons at the very moment of an assault launched from within the cover of the civilian population, draw fire from enemy forces that will have great difficulty discerning combatants from civilians (many of whom will be unintentionally killed as a result), and evade criminal liability for these actions, viewed widely as unlawful combatancy, upon capture. *See* George H. Aldrich, *Civilian Immunity and the Principle of Distinction: Guerilla Combatants and Prisoner of War Status*, 31 AM. U. L. REV. 871, 873 (1982) (stating that the modifications to the Geneva Conventions proposed by API "virtually assure[] that guerrillas . . . will disguise themselves as civilians and that the civilian population will suffer as a result"); DAP 27-1-1, *supra* note 50, the ICC Prosecutor should undertake the selective prosecution of United States personnel, but not the terrorists and their state sponsors, for actions associated with Operation Jeremiah is no more surprising than that United States forces, under heavy fire from these craven terrorists, should exercise their inherent right to self-defense.[624] "United States forces never have to wait until they take casualties before they do what is needed to defend themselves,"[625] and although our soldiers, forced to make split-second decisions, did everything possible to prevent civilian casualties, some hostages were killed as a result of gunfire. While the United States regrets their deaths, again, responsibility for this tragedy lies heavy upon al Qaida and the Government of Uzbekistan.

Moreover, the United States elected to employ various non-lethal weapons systems, including lasers and riot control agents, solely to enable United States forces to minimize

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at 138-39 (discussing official United States objections to Articles 43-44 of API); KWAKWA, *supra* note 4, at 90 (parsing Article 43 of API and identifying erosion of obligations incumbent upon irregular forces; L. Green, *The New Law of Armed Conflict*, 15 CAN. Y.B. INT'L L. 3, 14 (1977) (suggesting that if Article 44 is read to permit irregular forces to disguise their status for almost the entirety of their operations it will sully the principle of distinction and leave exposed the civilians it is designed to protect). In light of the foregoing, the answer to the question of whether members of al Qaida could be considered unlawful combatants during their counterattack on the Alpha teams during Operation Jeremiah is a function of applicable law, which remains unsettled, contested, and ultimately a political issue. Clearly, however, the taking of civilian hostages constitutes a grave breach of the GCIV, and thus a prosecutable war crime. For a thorough discussion of the concept of unlawful combatancy, see Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59 (2003).

[624] Just as states possess the inherent right to self-defense, individuals possess the right, under IHL, to defend themselves against attack. *See Trial of Eric Weiss and Wilhelm Mundo*, 13 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 149-51 (William S. Hein Co. 1997) (1949) (holding, in acquitting Erich Weiss and Wilhelm Mundo, tried on 9-10 November 1945 by United States military commission for the alleged unlawful killing of a United States POW, that "self-defense which, according to principles of penal law is an exonerating circumstances in the field of common penal law offenses when properly established, is also relevant, on similar grounds, in the sphere of war crimes"). Actions taken in self-defense must be necessary and proportional to the threat. *See United States v. Carl Krauch*, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1081, 1179 (1952) (restricting the defense of self-defense to those instances where actions taken in self-defense are necessary and proportional).

[625] Faculty, *supra* note 624, at 30.

civilian casualties while eliminating the illegal biological weapons stored in the Central Mosque. Although the United States Government recognizes various restrictions upon its right to employ certain weapons systems under the Conventional Weapons Convention[626] and the Chemical Weapons Convention,[627] the United States has never accepted restrictions upon its sovereign right to employ those means of war best calculated to strike a balance between military necessity and humanitarian considerations.[628] All instruments of war are cruel and inhuman in the sense that they cause destruction and suffering, but to brand the use of lasers and riot control agents—systems designed and employed to temporarily incapacitate, rather than to kill—as inflicting "unnecessary suffering"[629] suggests, contrary to fact, that there is such a thing as necessary suffering, or that it would be preferable to kill by gunfire rather than to incapacitate by other means.[630] It is not the amount of destruction or suffering that is relevant in appraising the lawfulness of a particular weapon but rather the superfluity of harm involved in accomplishing a legitimate military objective with that weapon.[631] In the best judgment of United States military commanders, based upon the tactical considerations and available intelligence, use of lasers and riot control agents constituted the most practical, and the most humane, means to afford our forces the security necessary to destroy the weapons of mass destruction.

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[626] Although the United States is a party to the Conventional Weapons Convention [hereinafter CWC] it has entered extensive reservations and accepted only parts of that instrument as binding, including Protocol I (prohibiting use of weapons that create fragments not detectable by x-ray) and Protocol II (concerning use of mines and booby traps); it has not accepted Protocols III (banning incendiary weapons) or Protocol IV (prohibiting blinding weapons). Commentators suggest that although the United States does not recognize Protocol IV it is adhering to it. *See* David Atkinson, *New Weapons Technologies Offer Complex Issues for Review*, DEF. DAILY, Sept. 1, 1999, at 1 (quoting W. Hayes Parks, Special Assistant to United States Army Judge Advocate General) ("We are not parties to [Protocol IV] but we are abiding by it."). For a list of CWC parties, see http://www.icrc.org/ihl.nsf.

[627] Official United States policy has long approved the use of riot control agents [hereinafter RCAs], *supra* note 526, to aid in the rescue of downed aircrews and the dispersal of civilians being used as human shields. *See* Exec. Order No. 11,850, 40 Fed. Reg. 16,187 (Apr. 8, 1975); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3110.07, NUCLEAR, BIOLOGICAL, AND CHEMICAL DEFENSE; RIOT CONTROL AGENTS; AND NON-LETHAL WEAPONS (July 3, 1995) (authorizing and instructing United States Armed Forces in the use of RCAs). Although neither the Executive Order nor the Instruction have been superseded, the United States Senate ratified the Chemical Weapons Convention in 1997, and President Clinton took the position that the CWC prohibits RCAs as analogous to prohibited chemical weapons. Warren, *supra* note 108, at 55 n.91. The interpretation of the Clinton Administration is not binding upon successor administrations, which in future conflicts might well order the use of RCAs on the ground that such weapons are non-lethal alternatives effective in particular tactical situations and do so consistent with their belief that RCAs are not prohibited under existing IHL.

[628] The United States has developed and deployed portable ground-based low-energy lasers for target-marking and range-finding but has not officially sanctioned their use, although at least one commentator suggests that their use in force protection and reprisal is consistent with IHL. *See, e.g.*, Carnahan, *supra* note 525; Noone, *supra* note 89 at 27-35. Other commentators maintain that blinding lasers are necessarily prohibited means of warfare in that they unavoidably cause unnecessary suffering. *See* Carnahan, *supra* note 525, at 730-31 (summarizing but criticizing position that laser weapons are of no military value and categorically illegal).

Finally, the President, acting in his official capacity as Commander-in-Chief in defense of the United States, issued lawful orders through the lawful chain of command to members of the United States Armed Forces who executed Operation Jeremiah. Members of the United States Armed Forces who receive and follow lawful orders such as these are entitled to rely upon the legal judgments of their military and civilian superiors.[632] The soldiers of Task Force Ryan did

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[629] *See* Hague Convention of 1907, *supra* note 96 (prohibiting methods and means that create "unnecessary suffering").

[630] *See* Carnahan, *supra* note 525, at 712 ("'[U]nnecessary suffering' implies that there is such a thing as 'necessary suffering,' because 'the infliction of some suffering and injury [is] an inherent feature of armed conflict.'")

[631] In determining whether a given weapon inflicts unnecessary suffering it is necessary to consider not merely the extent of that suffering but to balance it with the effectiveness of that weapon, and military effectiveness is calculated by measuring the success in destroying or neutralizing military material, in restricting the movement of enemy forces, in interdicting enemy lines of communication and command, in depressing enemy morale and elevating friendly morale, in eroding the stamina and cohesion of enemy forces, and in enhancing the security of friendly forces. Carnahan, *supra* note 525, at 713. Soldiers can only carry so much equipment on any given mission and are never able to access the entire range of weapons in their national arsenals, and commanders must make decisions, based on information available, in equipping their forces. North Atlantic Treaty Organization, NON-LETHAL WEAPONS, Lord Lyell (United Kingdom) General Rapporteur 1, STC (97)8 (Sept. 1, 1997). Moreover, where alternate weapons are unavailable, too costly, or ineffective, the use of the chosen weapons system is entitled to a presumption that it does not cause unnecessary suffering. Carnahan, *supra* note 525, at 713.

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[632] Prior to the 1920s, unquestioning obedience was demanded of soldiers, and soldiers who followed superior orders enjoyed absolute immunity for violations of IHL, as did the high government officials who issued such orders. ROGERS, *supra* note 42, at 137; WELLS, *supra* note 216, at xiv (stating that prior to 1944 United States soldiers were expected to obey orders without questioning their legal legitimacy). The domestic military regulations of leading states explicitly exempted soldiers acting on superior orders from criminal liability. *See, e.g.,* RULES OF LAND WARFARE (1917), *supra* note 561, at ¶ 366 (exempting from liability those whose violations of IHL were committed under orders from their "government" or "commanders"); R. v. Smith, 17 S.C. 561 (Cape of Good Hope 1900) (acquitting a British soldier who obeyed an order to shoot a civilian who refused to assist the British military effort on the ground that the 1899 Manual of Military Law provided that obedience to superior orders was an absolute defense and soldiers were entitled to rely upon the lawfulness of the orders issuing from their superiors). The Nuremberg Tribunals began to erode superior orders as a defense, confining it to mitigation of punishment and refusing to permit its applicability as a defense. *See* Charter of the IMT, *supra* note 33, art. 8. Anticipating this transformation, as well as the impending prosecution of Axis defendants, the U.S., under the direction of Army Chief of Staff General George C. Marshall, modified its Rules of Land Warfare in November 1944 to provide that superior orders did not automatically immunize the commission of manifestly unlawful acts. *See* RULES OF LAND WARFARE (1944), *supra* note 315, at ¶ 345.1 (amending previous version of superior orders defense to permit prosecution of individuals for manifestly unlawful acts). Although manifestly unlawful acts are generally described as those horrific and ghastly deeds which are objectively and gravely morally wrong and positively and clearly prohibited by law, specification of the exact set of such acts is difficult, as the law changes over time, and many of the acts soldiers can be lawfully ordered to undertake—namely, the deliberate killing of strangers—evoke the sentiments of intense revulsion, remorse, disgust, and horror that follow directly upon the heels of the commission of a manifestly unlawful act, such as the deliberate killing of POWs, the execution of schoolchildren, and rape. *See* OSIEL, *supra* note 23, at 113-14 (discussing manifest illegality in depth). The grave breaches provisions supply a ready enumeration of manifestly illegal acts, and most national codes of military regulation accept that a soldier may presume the lawfulness of superior orders and be excused from punishment for executing those orders if they prove unlawful provided the acts required of him by those orders neither run afoul of the grave breaches provisions nor "involve acts so transparently wicked as to foreclose any reasonable mistake concerning their legality." *Id.* at 5 ("The law is now generally understood to require that soldiers resolve all doubts about the legality of a superior's orders in favor of obedience. It therefore excuses compliance with an illegal order unless [the order is manifestly unlawful]"). The corollary to this compromise is that a soldier who commits acts of manifest illegality may not defend himself by asserting reliance upon superior orders.

Contemporary United States military regulations track this formulation closely, providing that courts-martial are prohibited from issuing jury instructions as to the superior orders defense in cases alleging the commission of manifestly precisely what they were ordered to do in a professional manner, and each and every one of their acts and omissions were both permissible under the laws of war and well within the scope of their lawful orders. As such they bear no legal responsibility whatsoever for Operation Jeremiah.[633] Nor can

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illegal acts but free to do so in cases where a defendant reasonably did not know that the act giving rise to the allegation of a war crime was unlawful. THE LAW OF LAND WARFARE (1956), *supra* note 43, ¶ 509. Paragraph 509 states the following:

> (a) The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.
> (b) In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.

Id.; U.S. v. Calley, 48 C.M.R. 19, 27 (1973-74) ("The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful."); U.S. v. Griffen, 39 C.M.R. 586, 588 (1968) (same).

The legal issue to be determined at a United States court-martial is thus whether the act giving rise to the specification with which the defendant was charged constitutes a manifestly illegal act for which the superior orders defense is unavailable. The Rome Statute, however, is silent as to the availability of a superior orders defense, suggesting either that the entirely of its jurisdiction is concerned with manifestly unlawful acts or that the negotiating parties intended to eliminate the defense.

[633] For arguments supporting and criticizing the proposition that military personnel who follow orders resulting in extensive civilian deaths and destruction can be held criminally responsible on the theory that reasonable military personnel would have recognized that the orders required the commission of manifestly unlawful acts, a position essentially identical to that staked out by the ICC Prosecutor in this fictional scenario see Richard Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965) (discussing the conclusion by a Tokyo District Court that the United

any legal liability be imputed, even under the most expansive interpretation of the command responsibility doctrine, to any senior military or civilian officials, whose lawful orders to subordinates were executed faithfully, professionally, and with all due attention to humanitarian considerations.[634] There can be no question of superior negligence where each and every act and omission of subordinates is both lawful and in compliance with orders, and where, as here, the orders themselves are lawful, the issue never arises.[635] Further-

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States bombing of Hiroshima and Nagasaki violated the principles of proportionality and distinction under IHL).

[634] *See supra* note 560 (discussing the absolute liability standard of command responsibility proposed by several scholars). The ICC might in theory interpret Article 28 of the Rome Statute to create de facto absolute liability of commanders for the acts of their subordinates by dispensing with the element that a commander either order an unlawful act or demonstrate gross and wanton negligence by failing to train and supervise his troops and failing to investigate and/or prosecute wrongdoing. *See infra* note 637. However, such an interpretation, even if it were to attain the status of customary IHL, would not be directly enforceable in United States courts-martial or in civilian courts of the U.S. . Customary international law is inferior to statutory law and will not be enforced in United States courts where there is a statute contrary to the international rule. United States v. Yunis, 924 F. 2d 1086, 1091 (D.C. Cir. 1991); Committee of Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988). The statute on point, Article 77 of the Manual for Courts-Martial providing the standard of command responsibility to be applied in a court-martial thus will trump the emerging customary IHL standard the ICC would seek to apply against United States defendants. *See* 10 U.S.C. § 877 (2000). Whether the ICC, after adopting the absolute liability standard, would concede, under the principle of complementarity, that the U.S., in applying the restrictive standard of liability resulting in the acquittal at court-martial of a defendant accused of command responsibility, had discharged its obligations in good-faith is a question without an answer.

[635] The argument that the United States President and other senior civilian decisionmakers are immune from criminal liability for the acts of subordinates in the absence of proof of a direct order requiring performance of unlawful acts or of criminal negligence is squarely within the contemporary jurisprudence of command responsibility:

> The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard

more, the President, as head-of-state, along with the Secretary of Defense and other public officials, are entitled to immunity for their official acts,[636] and nothing could be more

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of the action of his subordinates amounting to acquiescence.

The High Command Case, *supra* note 43, at 543-44.

[636] Since the inception of the state-centric international political and legal order with the Treaty of Westphalia in 1648, heads-of-state, along with other very senior civilian officials, enjoyed absolute immunity for their official acts. *See* Gilbert Sison, *Recent Development, A King No More: The Impact of the* Pinochet *Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L.Q. 1583 (2000). Although ultimate responsibility for the composition, missions, and rules of engagement of a military force rest with the highest civilian decisionmakers, and although it is these senior political leaders who, by authorizing or tolerating violations of IHL, bear ultimate responsibility for the crimes of their subordinates, international law, for most of the past four centuries, shielded persons in the highest echelons of state power from individual criminal responsibility for violations of IHL. M. Cheriff Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 202 n.13 (1998). However, the historical trend since 1945 has been to hold individual government officials, including heads-of-state, accountable for their official actions on the ground that the most heinous criminality is ultimately the work of these senior decisionmakers and that to continue to shield their conduct would effectively foreclose the imposition of criminal responsibility altogether or, alternatively, hold low-ranking personnel responsible for the orders of their superiors. FRYE, *supra* note 35, at 2. The jurisprudence of the ICTY suggests that under limited circumstances senior civilian and military leaders may be held criminally liable for the acts of subordinates. *See, e.g.,* Prosecutor v. Zejnil Delali, 1998 I.C.T.Y. IT-96-21-T, ¶¶ 356-63, 368-78 (Nov. 16) (Celebici Case) (Trial Chamber II Judgment) (citing *ILC Draft Code: Report of the International Law Commission on the work of its Draft Code of Crimes against the Peace and Security of Mankind*, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996)) (extending doctrine of command responsibility to civilian superiors to the extent that they exercise a degree of control over their subordinates similar to that of military commanders and thus are de facto part of the chain of command). Some commentators warn that the erosion of immunity for the official acts of senior civilian and military officials may encourage a "victorious nation [to] convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review. *In re* Yamashita, 327 U.S. 1, at 38, 40 (1946) (Murphy, J., dissenting) (suggesting further that, by virtue of the majority opinion upholding the conviction of a senior military commander for the unlawful actions of subordinates, all executive officials, including the President of the United States, were now potentially liable for the unlawful actions of the armed forces). Critics of the detention of former Chilean head-of-state General August Pinochet on a warrant issued by a Spanish magistrate alleging responsibility in the disappearance of the nationals of several states during a 1973 coup reiterated the argument offered by Justice Murphy and claimed that the rejection by a British court of the defense of head-of-state immunity, a decision contrary to customary international law, threatened to unsettle a

within the scope of official acts of state than a dispatch of national armed forces to do battle in self-defense.

> The United States has traditionally been in the forefront of efforts to codify and improve [IHL] with the objective of giving the greatest possible protection to victims of [armed] conflicts, consistent with legitimate military requirements.[637] Accordingly, the United States recognized and scrupulously upheld the laws of war during Operation Jeremiah.[638] However, war crimes and crimes against humanity

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domestic compromise reached in Chile and create a political dispute between Chile and the United Kingdom that could threaten international peace and security. *See* The Queen v. Bow Street Metro, Stipendiary Magistrate *ex parte* Pinochet Ugarte (1998), 3 W.L.R. 1456 (H.L.) (citing Article 27, Rome Statute, which states that heads of state are not exempt from criminal prosecution, as the basis for rejecting the proferred defense of head of state immunity); Lippman, *supra* note 42, at 58 (warning that extension of criminal liability to the policy level is "politically precarious" and potentially destabilizing). Whether customary IHL still makes room for the immunity of heads-of-state and the most senior civilian and military decisionmakers is unclear. The ICJ ruled that an incumbent Minister of Foreign Affairs enjoys immunity from criminal prosecutions conducted in foreign domestic courts during the pendency of his service in office. *See* Arrest Warrant of 11 April (Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), *reprinted in* 41 I.L.M. 536 (2002). However, the Rome Statute expressly eliminates the immunity of these officials. *See* Rome Statute, *supra* note 32, art. 25. Whether the ICC would forge a course similar to that of the ICTY and futher strip immunity from senior civilian and military decisionmakers, or else cotton to the opinion of the ICJ and protect that immunity, is uncertain. For a discussion of the trends in the doctine of the immunity of heads of state and senior civilian decisionmakers, *see* Hazel Fox, *The Resolution of the Institute of International Law on the Immunities of Heads of State and Government*, 51 INT'L & COMP. L.Q. 119 (2002); Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 EUR. J. INT'L L. 595 (2001); Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237 (1999).

[637] Message from the President of the United States to the Senate Transmitting the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Concluded at Geneva on June 10, 1987, S. TREATY DOC. NO. 2 (1987).

[638] Prior to World War II states, protective of their sovereignty, did not accept the notion that IHL applied to armed conflicts not constituting "wars" in the international legal sense of the term—conflicts between sovereign states. David Turns, *Prosecuting Violations of International Humanitarian Law: The Legal Position of the United Kingdom*, 4 J. ARMED CONFL. 1, 24 (1998). State sovereignty continues to play a role in determining the applicability of IHL: at present, IHL is applicable in its entirety only to international armed conflicts of significant intensity or where war has been declared: noninternational armed conflicts, and interstate conflicts of limited dimensions, give rise to a more limited set of obliga-

have become elastic concepts stretched by propagandists[639]

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tions incumbent upon states and members of their armed forces. Geoffrey S. Corn & Michael L. Smidt, *"To Be or Not to Be, That is the Question": Contemporary Military Operations and the Status of Captured Personnel: DAP 27-50-319*, 1999 ARMY LAW. 1; *see also* CJCSI 3121.01A, *supra* note 511 (stating that only international armed conflicts trigger all the obligations under IHL, and "not all situations involving the use of force are armed conflicts under international law."); KWAKWA, *supra* note 3, at 47 (noting that although the Geneva Conventions, widely considered to be the primary source of conventional regulation under IHL, are applicable to interstate conflicts, a significant level of intensity is required before an internal armed conflict comes within the limited coverage of Common Article 3 of those instruments, and states contest even the applicability of this lesser standard of protection); UNESCO, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 96-97 (conceding that it is "unclear whether the application of [IHL] . . . is called for under conditions of small-scale or low level violence between the armed forces of two or more states" unless war has been declared, in which case its applicability is *ipso jure* and without question); id. at 222 (indicating that the question of whether IHL applies to low-intensity conflicts and covert operations is susceptible of multiple pronouncements). Nonetheless, the Department of Defense has adopted the official policy that all members of every service component are obligated to "comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations[,]" effectively vitiating the significance of the nature of the particular conflict at issue in terms of determining applicable sources of IHL. DEP'T OF DEFENSE DIR. 5100.77, DOD LAW OF WAR PROGRAM ¶ 5.3 (Dec. 9, 1998). The Chairman of the Joint Chiefs of Staff has ordered that "[t]he Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the U.S. Armed Forces will comply with the principles and spirit of the law of war during all other operations." CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (Mar. 25, 2002) [hereinafter CJCSI 5810.01B]. The official United States position, one adopted by many states, comports with the recommendations of various NGOs and other organizations which suggest that IHL be actively merged with human rights rights laws and principles the better to protect the participants and victims of armed conflicts. *See, e.g.*, FEILCHENFELD, *supra* note 219, at xiii (advocating the "[e]xtension to all persons actually participating in armed hostilities amounting to 'war' of all the rights and duties under the law of war that may be reasonably demanded, regardless of formal recognition of their legal status or their conformity to all of the 'conditions' traditionally required for belligerent status."); OSCAR M. UHLER ET AL., COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (1958) (arguing for liberal extension of protections of Common Article 3 during internal armed conflicts); Parkerson, *supra* note 511, at 44 (stating that an examination of state practice reveals that the Geneva Conventions in their entirety are applied to every armed conflict between states).

[639] *See* BEST, *supra* note 20, at 350 (stating that the treatment of POWs, as well as the prosecution of soldiers who mistreat POWs, is part of the propaganda campaign at the heart of every modern conflict).

to reach lawful acts of self-defense. Even as the United States sets the standard for other nations to follow in their observance of humanitarian principles, we must not, and need not, give . . . protection to terrorist groups as a price for progress in humanitarian law.[640]

To reiterate, Operation Jeremiah was a proportionate, discriminate response ordered by the President of the United States consistent with the inherent right of self-defense recognized in the U.N. Charter. That it resulted in civilian casualties is regrettable, but the responsibility for the destruction of civilian lives and property is the sole responsibility of the terrorist group al Qaida and the Uzbeki sponsors, whose decision to site weapons of mass destruction in a house of worship needlessly imperiled the civilian population in serial violation of applicable humanitarian law. The object was limited to the destruction of those weapons, which the terrorists intended to use against United States citizens, and the choice of weapons and tactics—made in consultation with legal advisors in reference to applicable law[641]—was calculated to reduce the suffering of the civilian population. None of the United States civilian or military personnel that operationalized and executed the lawful orders of the President violated any laws. Once again, although the United States regrets civilian casualties subsequent to Operation Jeremiah, given the foregoing the United States had no legal obligation to investigate or prosecute any of its nationals for their acts or omissions in furtherance of this mission, which, by eliminating weapons of mass destruction the terrorists had imminent plans to use against United States citizens, clearly prevented significantly greater number of civilian deaths. In sum, no acts or omissions of any United States nationals satisfy any elements of any crime within ICC jurisdiction, and the United States will not submit to any tribunal other than the moral judgments of history.[642]

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[640] Message, *supra* note 638, at 7, *reprinted in* 81 AM. J. INT'L L. 910 (1987).

[641] The role of the JAG Corps in providing legal advice as to the conduct of war consistent with IHL is not limited to approving targets or developing ROEs; on the contrary, it is constantly expanding and reaching further into policy analysis in recognition of the effects that compliance decisions have upon political relationships. *See* Lewis, *supra* note 523, at 486-87, 508 (stating that the JAG officer's role as legal advisers is "not strictly limited to giving 'legal' advice based upon the laws of war . . . . Inasmuch as political considerations also impose restrictions on the use of force, the JAG serves as a political adviser as well.").

[642] *See* Korematsu v. United States, 323 U.S. 214, 248 (Jackson, J., dissenting)

The Ambassador submitted a draft resolution calling upon the Security Council to delay prosecution for one year as provided in Article 16 of the Rome Statute, but it was immediately voted down by China, Russia, France, Syria, Iran, Netherlands and Iraq. In response, he declared that the United States, as a non-party to the Rome Statute, had no obligation to cooperate[643] with an institution the "sole purpose of which is to put United States citizens and United States foreign policy, along with the citizens and policies of our adversaries in the war on terror, up to the skewed judgment of the world."[644] The next day the United States President issued a terse letter to the ICC President refusing cooperation in the arrest and extradition of the named defendants, and in turn the ICC President reported United States non-cooperation to the Security Council[645] and requested assistance.[646] The Security Council voted that after-

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("The chief restraint upon those who command the physical forces of the country . . . must be their responsibility . . . to the moral judgments of history.").

[643] Article 87(5) permits the ICC to "invite" states that are not parties to cooperate in its investigation and prosecution of their nationals but does not of its own legal force compel them to do so, and Article 89(1) simply provides that the ICC can "request" of non-parties the arrest and surrender of their nationals and that only "States Parties" are obligated to comply. As such, non-party states cannot be said to have legal duties to cooperate with the ICC unless such duties arise under customary international law, which position the United States has and would likely continue to reject although the ICTY has ruled otherwise. *See* Prosecutor v. Tihomir Blaskic, 1997 I.C.T.Y. IT-95-14-AR-108, ¶ 26 (Oct. 29) (Judgment on the Request of the Government of Croatia for Review of the Decision of the Trial Chamber of July 18, 1997) (holding that cooperation with the ICTY was an obligation "erga omnes."). However, some of the most outspoken advocates of the ICC concede that it "makes little sense for State parties that have not accepted the jurisdiction of the [ICC] with respect to the particular crime under investigation or prosecution to be under any legal obligation to cooperate with the [ICC]." Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'N L. REV. 103, 117 (1994).

[644] Mark Matthews, *Court Has to Get by Without U.S.; Tribunal: Denied the Right to Exempt its Nationals from the Jurisdiction of the Planned International Criminal Court, America Opts Out of the Treaty*, BALT. SUN, July 22, 1998, at A2 (quoting spokesman for Sen. Jesse Helms).

[645] *See* Blaskic, 1997 I.C.T.Y. IT-95-14-AR-108, ¶ 33 ("[The ICTY] is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. It has also the power to report this judicial finding to the Security Council."). Similar power might be conferred upon the ICC.

[646] *See id.* ¶¶ 25-37 (holding that the president of an international criminal

noon on a Sino-Soviet resolution, defeated by a United States-UK veto and a bloc of abstentions, which would have condemned the United States and imposed economic sanctions under Chapter VII for its "failure to surrender for trial the defendants associated with Operation Jeremiah, an act of state terrorism," although the General Assembly called upon member states to contribute forces to enforce the ICC request for United States cooperation.[647]

In light of the failure of the Security Council to compel United States cooperation in the case of *Prosecutor v. Task Force Ryan.*, the Prosecutor tried the defendants in absentia.[648] After a bench trial lasting one month, all were convicted on all counts of the indictment. In response, the United States Congress passed a joint resolution authorizing the President "to use all necessary force to prevent the forcible abduction or rendition of any United States national associated with Operation Jeremiah."[649] The legislation also resolved that

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tribunal may request that the Security Council force compliance with arrest warrants).

[647] *See Uniting for Peace*, G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/RES/377(V) (1950) ("Resolv[ing] that if the Security Council . . . fails to exercise its primary responsibility for the maintenance of international peace and security . . . the General Assembly shall consider the matter immediately with a view making appropriate recommendations to Members for collective measures . . . .") (providing legal justification for collective enforcement measures against North Korea when the Security Council was paralyzed).

[648] Although the Rome Statute as codified prohibits trial in absentia, the Statute can be amended to provide for de novo trial of a defendant upon his capture and rendition to the custody of the ICC even if he has been previously tried and convicted before the ICC. *See* Rome Statute, *supra* note 32, art. 62 (prohibiting trial in absentia); *but see id.* art. 121 (permitting amendment of the Rome Statute). Some scholars urge the amendment of the Rome Statute to permit trial in absentia in order to enable the preservation of witness testimony and documentary evidence as well as to diminish the incentive for states to resist cooperation with the ICC. *See, e.g.*, Chase, *supra* note 30, at 196. The ICTY has considered, but not attempted, the trial in absentia of defendants not in the custody of the tribunal, a proceeding permissible under Rule 61 of the Statute of the ICTY, on the ground that to fail to do so would likely have the effect of permanently precluding the adjudication of their guilt or innocence and as such would frustrate the interests of justice and the purpose of the ICTY. *See* U.S. NEWS & WORLD REP., Dec. 25, 1997, at 47 (quoting Richard Goldstone, former Chief Prosecutor of the ICTY).

[649] Under customary international law, the forcible rendition of a criminal

should any state assist the ICC in its efforts to obtain physical custody over these United States nationals, "a state of war will exist between the United States and that nation."

C. Lessons

The preceding analysis suggests that the substantive content of IHL secures compliance to the extent that it does so not because the rules and regulations are constitutive of a positive legal canon, but because those aspects of the canon that soldiers obey are already internal to the martial profession in the form of the martial code. The juxtaposition of the two paradigms suggests further that "to be broadly acceptable in practice, rules [of IHL] must respect the reasonable requirements of the armed forces for the efficient conduct of hostilities and minimization of their casualties, while equally being consistent with generally accepted humanitarian principles."[650] According-

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suspect or convict in connection with a crime committed outside the territorial jurisdiction of the rendering state is permissible under the principle of universal jurisdiction in regard to crimes including, inter alia, war crimes and crimes against humanity. *See* United States v. Best, 304 F.3d 308, 316 (3d Cir. 2002) (holding that forcible abduction of an alien, even if arguendo in violation of applicable international legal principles, is no defense to jurisdiction); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (same); Attorney General of Israel v. Eichmann, Dist. Ct. Jerusalem (Isr. 1961), 36 INT'L L. REP. 5 (1961) (same). Forcible rendition to hale the offender into the United States is permissible as well under United States law. *See* United States v. Alvarez-Machain, 504 U.S. 655, 663-70 (1992) (applying the Kerr-Frisbie rule to hold that the forcible rendition of a criminal suspect from a state with which the United States maintained a treaty of extradition was permissible under United States law); United States v. Rezaq, 908 F. Supp. 6, 7-8 (D. D.C. 1995) (same). Moreover, the Rome Statute imposes general and specific obligations upon Parties to cooperate with the ICC under Articles 86, 87, 93, and 111, to include rendering persons it has formally accused or convicted of crimes. For the United States to object to the rendition of United States nationals, forcible or otherwise, by State Parties to the ICC, it would appear obligated to do so upon non-legal grounds, and to seek non-legal remedies in the event of such rendition. For a discussion of forcible abduction to secure jurisdiction under domestic as well as international law, see generally Aaron Schwabach & S.A. Patchett, *Doctrine or Dictum: The* Ker-Frisbie *Doctrine and Official Abductions Which Breach International Law*, 25 U. MIAMI INTER-AM. L. REV. 19 (1993).

[650] OSIEL, *supra* note 23, at 31-32. In all regulatory regimes, compliance is a function of the degree to which the rules promote the ends, and any given rule draws strength in proportion to the extent to which it makes sense to whom it

ingly, institutions called to adjudicate alleged violations of IHL ought to immunize, rather than criminalize, good-faith measures undertaken to defend law and civilization, even if and where such measures depart from the formal, positive legal prescriptions and proscriptions of IHL, particularly as that canon comes to be interpreted by outsiders to the martial profession.[651] Where a modality of adjudication would criminalize acts promotive of the ends law is tasked to serve, that modality is objectively dysfunctional. Martial honor, reliant upon a regime of self-regulation that secures compliance with a rigorous code of conduct upon pain of disgrace and death while nonetheless recognizing exigencies unique to the experience of the combat soldier and immunizing all but those acts that genuinely and universally smack of barbarism, is not only conducive to a more holistic and stricter standard of judgment of the martial caste but better suited than the ICC to accomplishing the critical functional task of suppressing inhumanity in war without disabling the defense against existential threats posed by manifestly evil adversaries dedicated to the destruction of civilization.[652]

Moreover, the contrast between martial honor and the ICC

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applies. FISHER, *supra* note 127, at 101. Where rules frustrate the labors of those laboring to attain the ends of a legal regime, compliance diminishes. *Id.*

[651] The duty to defend Western civilization—the highest good imaginable—implies the duty to craft and wield those weapons that enable this defense. *See* Gross, *supra* note 45, at 460-61 (charging the West with this duty). Thus, the duty of the Western democratic state, engaged in a war against Islamic terror, to its own citizens may mitigate or even obviate any correlative duty to non-citizens to strictly observe of all the politically malleable principles of IHL.

[652] For a discussion of functionalist theory, *see infra* note 705. Studies of compliance with domestic criminal law suggest that appeal to professional, social, and above all moral claims as to what is right and what is wrong are significantly more likely to prompt behavior consistent with legal rules than is the threat of punishment. *See, e.g.*, Tom. R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219 (1997); Grasmick & Bursik, *supra* note 131. If achieving isomorphism between the moral content of law and the moral values of the regulated is the royal road to legal compliance, then an IHL canon whose prescriptions and proscriptions reflect (and to some extent condition) the moral sentiments of soldiers and maps closely with their endogenously-determined moral commitments is best likely to secure compliance and contribute simultaneously to the humanization of war and the defense of civilization.

also demonstrates that the stakes associated with the choice of paradigms have been raised by the drift of the IHL canon over the past quarter-century. The provisions of the Protocols Additional purporting to redefine proportionality and distinction drain the principle of necessity of nearly all meaning,[653] and pronouncements upon the legality of particular weapons systems inure to the benefit of terrorist groups and rogue states masquerading as lawful combatants.[654] Further, the proliferation of dubious declarations as to what constitutes customary IHL, and even more importantly, how it is to be interpreted in adjudging individual criminal responsibility in connection with certain methods and means of war, along with intemperate claims that preemption is synonymous with aggression, threaten to disrupt what remains of the equilibrium between operational necessities and IHL. In short, contemporary IHL absolutists, by eliding distinctions between lawful and unlawful combatants and adopting an interpretive approach absolute with respect to observance of self-declared rules concerning methods and means of war (the *jus in bello*)[655] but agnostic with respect to the justice of the cause on behalf of which combatants take up arms (the *jus ad bellum*),[656] privilege terrorists at the expense of their fettered targets.

In other words, the credibility of IHL, cut adrift to terrorists' advantage, is at a nadir at an extraordinarily unpropitious moment in world history to bull forward with an ill-conceived, absolutist catechism.[657] The contemporary push to simultaneously formalize and internationalize adjudication of (alleged) violations committed under such exigent circumstances, a misguided crusade that offers succor to terrorists, is the legitimate subject of critical examination.[658] However, despite incipient awareness that IHL is waxing perilously anachronistic with respect to the scourge of terrorism,[659] heretofore there has been no proposal for its substantial modification.[660] In part this is attributable to the magnitude of the venture. The defense by rationalization of IHL necessitates more than the modification of tactics; it requires re-examination, and perhaps re-imagination, of the IHL canon, as well as the reclamation of responsibility for its creation and application[661] by the predominant actor (the U.S.) that has consistently been able and willing to defend it, and the civilization from whence it sprung, against barbarism. In some measure it is due to a lack of scholarly temerity: the very act of challenging the adequacy of IHL, save by advocating greater restrictions upon state military forces, is considered by many within the academy to be impolitic, if not heretical, and repudiating the prevailing claims of moral equivalence between democratic states and their terrorist enemies and suggesting a wide margin of appreciation for the former, may be grounds for excommunication.[662] Nonetheless, because the defeat of terrorism is prefigured by the development of not merely an effective military strategy but also a common legal strategy with which those arrayed against terror can reverse the base exploitation of IHL that occupies so central a position in the terrorist campaign,[663] the next Part reintroduces the concept of "barbarians" as the framework around which to craft a legal strategy intended to internalize the costs of terrorists' violations of IHL while empowering, rather than hobbling, the robust application of military force to the defense of global order.

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[653] *See* Carnahan, *supra* note 43, at 23 (describing the principle of military necessity from the perspective of IHL absolutists as "something that must be overcome or ignored if [IHL] is to develop").

[654] *See supra* notes 95-97 and accompanying text.

[655] *See supra* note 12 (defining *jus in bello*).

[656] *See supra* note 12 (defining *jus ad bellum*).

[657] A pair of international scholars have defined the current juncture in international relations where old rules seem inadequate to the times and much rethinking of positive and normative foundations is necessary as an "international constitutional moment." Anne-Marie Slaughter & William Burk-White, *An International Constitutional Moment*, 43 HARV. J. INT'L L. 1 (2002).

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[658] Criticism is a "crucial part of the historical process through which [IHL] is made." WALZER, *supra* note 12, at 43-44. Just as its historical evolution toward greater protections was induced by post hoc casuistry and subjected to philosophical criticism, its venture into a new era of asymmetrical warfare ought to be accompanied at every step by the requisite degree of criticism necessary to ensure its continued functionality lest IHL become an unrealistic regime inapplicable to modern combat. *See* FLORY, *supra* note 154, at 9 (asserting that only the constant re-examination of IHL can forestall its "complete breakdown").

[659] IHL evolved in consideration of traditional force-on-force conflicts and has been viewed for a decade as unsuitable to conflicts with terrorists and other subnational actors. Interview with Colonel Guy Roberts, U.S. Marine Corps (May 28, 2003) (stating that Protocols Additional were drafted in late 1960s in response to a perception that IHL was ill-suited to the Third World conflicts likely to predominate). However, few commentators, until recently, have brought this point to the fore. In a development perhaps unimaginable only several years ago, a growing, yet still quiescent, chorus consisting not solely of American voices calls for the general revisitation of IHL in light of its inutility with respect to the War on Terror. *See, e.g.*, U.S. Ambassador for War Crimes Issues Pierre-Richard Prosper, Address at the Royal Institute of International Affairs, London (Feb. 20, 2002) ("The war on terror is a new type of war not envisioned when the Geneva Conventions were negotiated and signed . . . . We should look at all international documents to see whether they are compatible with this moment in history."); Communication from the Embasy of Switzerland in Washington, D.C., to the U.S. Dep't of State (Sept. 13, 2002) (stating that the Swiss Foreign Ministry "wishes to . . . provide a space for debate on the reaffirmation and development of [IHL] in light of the new and evolving realities of contemporary conflict situations.").

[660] The ICC framers contemplated the eventual addition of terrorism to ICC jurisdiction. *See* Rome Statute, Annex I, Res. E, U.N. Doc. A/CONF.183/10 (1998). However, neither the Rome Statute nor any other instrument has propounded the sort of major revision several commentators suggest is essential to the defeat of terrorism. *See infra* note 809 and accompanying text.

[661] *See infra* note 774 and accompanying text (discussing detrimental shift in "ownership" over IHL).

III. CONTRA BARBARUM: A PROPOSAL FOR A RATIONALIZED THEORY OF THE LAWS OF WAR

A. Barbarians: A Conceptual Definition

The ancient Greeks and Romans, who believed in a natural moral order inherent in the universe which bound all peoples and upon which law rightly supervened,[664] divided the world into two spheres, with the first inhabited by "civilized" peoples whose affairs were governed by public laws and ethical principles derived from this order and the second the domain of savage, hedonistic, immoral "barbarians" who rejected public legal authority and invested political power in a head-man in whom they tolerated corrupt authoritarianism.[665] Whereas civilized people committed themselves to cities, culture, learning, commerce, and diplomacy, barbarians were nomadic groups bereft of letters, culture, and alliances[666] whose sole occupations were destruction, pillage, and war.[667] To keep barbarism at bay, Roman law incorporated stark dichotomies as between barbarians,[668] near-rightless persons who by virtue of their existence beyond the pale of law-governed civilization were not entitled to the sacred privileges of Roman citizenship[669] including the protections of Roman civil law (*jus civile*),[670] and citizens (*cives*), who enjoyed full legal personhood under *jus civile*.[671] In other words, "barbarian" connoted rejection of a civilization constituted around public law and obliga-

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[662] So powerful is its compliance pull that even United States policymakers shy from acknowledging its shortcomings. JEAN B. ELSHTAIN, JUST WAR AGAINST TERROR 71 (2003) ("Somewhere along the line, the idea took hold that, to be an intellectual, you have to be *against it*, whatever *it* is. The intellectual is a negator."). A few brave voices can yet be heard. *See, e.g.*, George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 WAKE FOREST L. REV. 129 (2003) (suggesting IHL is "due for reassessment"); J. Bryan Hehir, *Just War Theory in a Post-Cold War World*, 20 J. RELIGIOUS ETHICS 237, 238 (1992) (discussing danger in "understating how completely we need to rethink [IHL]").

[663] To suggest the centrality of a legal strategy to the defeat of terrorism is not to deny the importance of other policy instruments, such as diplomacy and the dissemination of democratic principles, to the long-term objective of civilizational coexistence with Islam. *See generally* JEFFREY F. ADDICOTT, WINNING THE WAR ON TERROR (2003) (arguing that the War on Terror requires a short-term military solution and a long-term political solution achievable through promotion of democracy and human rights).

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[664] *See* WOODROW W. BORAH, JUSTICE BY INSURANCE 6 (1983) (discussing Greco-Roman concept of divine ordination of universal moral-legal order). Ancient Confucian societies shared the Greco-Roman concept of a natural universal order to which barbarians did not conform.

> The barbarians are covetous for gain—human-faced but animal-hearted . . . As for clothing, food and language, the barbarians are entirely different from the people of the Middle Kingdom . . . . Therefore, the sage rulers . . . neither established contact with them nor subjugated them . . . . [T]hey are always to be considered as outsiders, never as citizens. Our administration and teachings have never reached their people . . . . Punish them when they come in and guard against them when they retreat . . . . Restrain them continually . . . .

Alice Erh-Soon Tay, *Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law*, 26 HONG KONG L.J. 194, 205 (1996) (quoting official Han Dynasty history). However, Confucian societies closed themselves off from barbarians not because barbarians abjured responsibilities under public law in favor of private authority but because barbarians, unlike Confucians, required extensive regulation. *See* XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION 20-21 (1997) (restating position that "law was for barbarians, not for Confucians, because an ideal society did not require extensive legislation . . . and law was an instrument of last resort"). The Confucian position—that the need for, rather than the source of, regulation is determinative of barbarian status—is at variance with the Greco-Roman position. For purposes of parsimony, the latter position serves as the historical foundation for the conceptual definition of barbarians in this Article.

[665] THE CIVIL LAW (S.P. Scott ed. & trans., Lawbook Exchange 2001) (1932) [hereinafter THE CIVIL LAW]. For a thorough discussion of the moral, cultural, and philosophical grounds upon which the ancients distinguished between civilized peoples and barbarians, see THE THEODOSIAN CODE AND NOVELS, AND THE SIRMONDIAN CONSTITUTIONS 3-7 (Clyde Pharr trans., 1952); M.P. Pearson, *Beyond the Pale: Barbarian Social Dynamics in Western Europe*, *in* J.C. BARRETT ET AL., BARBARIANS AND ROMANS IN NORTH-WEST EUROPE FROM THE LATER REPUBLIC TO LATE ANTIQUITY 198-226 (1989); PETER S. WELLS, THE BARBARIANS SPEAK: HOW THE CONQUERED PEOPLES SHAPED ROMAN EUROPE (2001).

[666] *See* John Stuart Mill, *Civilization*, *in* ESSAYS ON POLITICS AND CULTURE 49

(Gertrude Himmelfarb ed., 1962) (contending that "none but civilized nations . . . ever . . form[ed] an alliance").

[667] According to the ancient Roman historian Herodotus in his *Histories*, "[B]arbarians can neither think nor act rationally [and] . . . are driven by evil spirits . . . who force them to commit the most terrible acts . . . . [They are] incapable of living according to written laws and only reluctantly tolerating kings . . . . Barbarians are without restraint . . . ." HERWIG WOLFRAM, THE HISTORY OF THE GOTHS 6 (1990). Tacitus' Germania, written in the first century A.D., elaborates a similar disgust with barbarian venality in contrast with Roman virtue. *See* CORNELIUS TACITUS, GERMANIA 6-10 (J.B. Rives trans., 1999) (describing barbarians as a violent, slothful, hedonistic people largely without laws). Contemporary accounts of the disparities between ancient barbarians and civilized contemporaries track closely with this formulation. *See, e.g.*, SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 321 (1996) (contrasting the "rich accomplishments in religion, art, literature, philosophy, science, morality, and compassion" of the "world's great civilizations" with their absence in barbarian "cultures"). Some scholars contest the Greco-Roman view of barbarians as destructive, warmongering philistines bereft of morals and ethics and insist that barbarians possessed rich cultures and effective, if private, legal systems that strove to uphold certain virtues. *See generally* MARC SALTER, BARBARIANS IN INTERNATIONAL RELATIONS (2002). However, it is not necessary to prove or disprove either thesis to borrow the concept of a distinction between civilization and barbarism and transfer that concept to analysis of the role of law in the conflict between a Western civilization committed to law, order, and a set of ethical principles that categorically proscribe terrorism on the one hand and a group of anti-civilizational terrorists committed to destruction of these values and principles on the other.

[668] Roman *jus civile* originally divided free peoples into two classes—*cives* (citizens) and peregrini, a category that included aliens, barbarians, and others who could claim no rights either private or public. THE CIVIL LAW, *supra* note 666. A third class, *latini*, was added later. *Id.* Slaves could be made of persons from any of the preceding categories.

[669] WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW 201 (1989).

[670] *See id.* at 202 (describing barbarians as outlaws subject to *jus gentium* (law of peoples) and not the more favorable *jus civile*)

[671] *Id.* at 200 (noting that Roman jurisprudence was exclusively applicable to only those enjoying Roman citizenship, the *cives*).

tions descending therefrom in favor of parochial customs and rules and private sources of authority. In contrast, a "citizen" was a member of civilization who accepted the rule of public law and attendant obligations, including taxation and military service,[672] and citizenship, a precious concept, imposed the unremitting obligation to behave in keeping with duties to the natural legal order upon which civilization rested: a citizen convicted of a serious crime forfeited his citizenship and assumed the status of a *de facto* barbarian,[673] as did *cives* captured in war[674] and others who suffered impairment of their civic honor.[675] The distinction was crucial: armed operations against barbarians could be initiated without invoking the blessings and protection of the Roman gods that preceded wars against non-barbarians because the former did not possess the legal personality necessary to be legitimate subjects of warmaking,[676] and Roman military commanders were granted near-unlimited authority to destroy barbarians to whom the Roman laws of war did not reach.[677] When fighting barbarians, the *bellum hostile*, a regime characterized by restraint, was supplanted by the unlimited *bellum romanum*.[678] Similarly, the Greeks accepted no restraints in inevitable conflicts with barbarians.[679]

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[672] THE CIVIL LAW, *supra* note 666.

[673] *Id.* (indicating that loss of citizenship imposed a condition akin to outlawry).

[674] BURDICK, *supra* note 670, at 204-05.

[675] Civic honor, an essential element of Roman citizenship, obligated *cives* to conduct themselves so as not to bring disgrace upon Rome and so as to remain fit to render service to civilization. *Id.* at 208. *Cives* who failed in this duty suffered immediate impairment of civic honor and were stripped of citizenship. *Id.* at 209 (explaining Roman doctrine of *infamia immediata*).

[676] JULIUS CAESAR, THE GALLIC WARS 5.55 (H.J. Edwards trans., 1970).

[677] ALFRED P. RUBIN, THE LAW OF PIRACY 6-7, 9 (1988) (noting that whereas non-barbarian enemies might be taken prisoner or otherwise granted the benefit of the protections of Roman laws of war, barbarians were generally denied quarter unless they agreed to accept the laws and political authority of Rome). Against barbarians, in the words of the Roman Senator and jurist Marcus Tullius Cicero uttered in 50 B.C., *silent leges inter arma* ("In time of war the law is silent.").

[678] *See* HOWARD, ET AL., *supra* note 12, at 34 (elaborating distinctions between *bellum hostile*, a war between civilized peoples in which nascent restraints of the era were operative, and *bellum romanum*, a "war of fire and sword" without any legal restraints whatsoever which could be fought only against barbarians).

The citizen-barbarian distinction, drawn to sharply limn the separation between societies organized around public law on the one hand and the rule of man on the other, coupled with the application of different sets of rules and norms to govern armed conflicts against citizen as distinct from barbarian enemies, survived the fall of Rome, and from 400-900 A.D. much of Europe evolved pluralistic legal systems that applied one law, the *lex romanum*, to Romans and another, known as the *lex barbarorum*, to tribes and political communities beyond the reach of the Roman legal order.[680] However, by the second millennium, the diffusion of Roman law[681] and the rise of strong nation-states with institutions of organized coercion effective in securing compliance with codified systems of public law drew vast areas outside the former boundaries of Roman rule within the realm of civilization, a process that largely subsumed the *lex barbarorum*.[682] Nonetheless, certain individuals and groups continued to resist the tide of history and remain outside the reach of public laws and institutions, and the citizen-barbarian distinction thus became important less to specifying imperial boundaries than to the development of new legal regimes to counter the emerging phenomenon of transnational criminality.

In medieval England, those who defied legal obligations by refusing to appear in court when summoned[683] or committing particularly egregious felonies were held to be beyond the protection of the law under the doctrine of "outlawry."[684] Outlaws, as persons with no enforceable legal rights,[685] could be killed by all upon sight, and their property was forfeit, by operation of law, to the crown.[686] Likewise, associates of outlaws were outlawed and subjected to summary punishment, as were the issue of traitors in punishment for treason.[687] A decree of outlawry could not be evaded by flight: comity provided that those outlawed by one court were accorded the same status in other jurisdictions.[688] With the rise of piracy in the sixteenth century, international law drew from the ancient barbarian distinction, along with the doctrine of outlawry, to provide that pirates and other private bands of organized criminals[689] were in perpetual war with all mankind[690] and thus, as *hostis humani generis*[691] subject to attack by any and all persons at

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[679] *See* PLATO, MENEXENUS (Benjamin Jowett trans., 1990s) (recommending moderation in relations between Greeks but none in relation to barbarians); *see also* RONALD B. LEVINSON, IN DEFENSE OF PLATO 223 (1953) (illuminating Platonic arguments as to the inevitability and savagery of conflicts with barbarians).

[680] Tay, *supra* note 665, at 198.

[681] *See* PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (1999) (discussing diffusion of Roman law).

[682] Not all the known world became "civilized," and medieval Christians were cnouraged by secular and clerical elites to take up arms against the barbarian Muslims. *See* AUGUST C. KREY, THE FIRST CRUSADE: THE ACCOUNTS OF EYEWITNESSES AND PARTICIPANTS (1921) (describing *exhortatio ad bellum contra barbaros*—the call to Christian Crusaders to take up arms against the barbarians holding Jerusalem).

[683] *See* 3 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 604-07 (5th ed. 1942) (stating that failure to answer a minor charge when summoned to court resulted in forfeiture of property and chattels, whereas failure to answer a felony

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charge, particularly of treason, was considered a tacit admission of the charge that resulted in conviction of the offense and outlawry).

[684] *See* 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 449 (2d ed. 1899) (describing "outlawry" as the condition of being an object, rather than a subject, of law, and of being beyond the protection of the civilized legal order).

[685] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 319 (describing legal status of outlaw as "put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect").

[686] *See id.* (noting that an outlaw under early English law was described as *caput lupinum* ("having a wolf's head"), by virtue of the fact that he might be "knocked on the head like a wolf by anyone that should meet him"). Outlaws were effectively dead to the law, or *civiliter mortuus* ("dead citizens"). *Id.*

[687] *See* 3 HOLDSWORTH, *supra* note 684, at 69 (reporting that in a defendant who suffered a "judgment of outlawry upon an indictment for felony" or who was convicted of a felony was subjected to "corruption of blood" whereby he lost his ability to own, inherit, or devise property.)

[688] *See* 2 POLLOCK & MAITLAND, *supra* note 685, at 584 (stating that the legal effect of outlawry extended across jurisdictions by the principle of comity and that a "man outlawed in one shire was outlaw everywhere."). The adoption of extradition treaties has rendered outlawry all but obsolete.

[689] *See* 3 GROTIUS, LIBRI TRES, *supra* note 155, ch. 3 (defining as international outlaws all those banded together for criminal wrongdoing, including pirates, but excluding states that engaged in illegal acts on the ground that their wrongdoing was nevertheless authorized by legitimate public authority and thus not anti-civilizational).

[690] *See* 1 GENTILI, COMMENTARIES ON THE LAW OF WAR ch. 4 (1598) (classifiying pirates as outlaws and "common enemies of all mankind").

[691] *See* 4 WILLIAM BLACKSTGONE, OF PUBLIC WRONGS 66, 72 (R. Kerr ed.,

any time[692] without legal niceties, such as a declaration of war[693] or the protection of the laws.[694] Regardless of nationality, all persons were entitled, under universal jurisdiction[695]

1962) (1803) ("The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*.") (quoting Coke, C.J., in King v. Marsh, 3 Bulstr. 27, 81 E.R. 23 (1615)).

[692] *See* RUBIN, *supra* note 678, at 87 ("[A]ll Pirates and Sea-rovers, . . . are in the Eye of the *Law Hostes humani generis*, Enemies not of one Nation . . . only, but of all Mankind. They are outlawed . . . by the Laws of all Nations; that is, out of the Protection of all Princes and of all Laws whatsoever. Every Body is commissioned, and is to be armed against them . . . to subdue and to root them out.") (citing seventeenth century scholar Leoline Jenkins).

[693] PIERINO BELLI, DE RE MILITARY ET BELLO TRACTATUS ch. 11 (1564).

[694] *See* GENTILI, *supra* note 691 (stating that the laws of war are not applicable to pirates on the ground that the protections of international law are applicable only to those acting under the command of a legitimate sovereign and that pirates are merely private miscreants unauthorized to engage in violence by a legitimate public sovereign); RUBIN, *supra* note 678, at 70 (stating that pirates, by rendering themselves enemies of all mankind "ha[ve] thereby lost [their] right in the law of nations") (quoting seventeenth century statement of the King's Advocate of the Admiralty, Dr. William Oldys); *In re* Change to Grand Jury-Treason, 30 F. Cas. 1049, 1049-50 (C.C. Mass. 1861) (No. 18,277) ("[Pirates] carry on war, but it is not natural war; and they are not entitled to the benefit of the usages of modern civilized international war. There being no government with which a treaty can be made, or which can be recognized as responsible for the acts of individuals, the individuals themselves are [liable to punishment]."). The treatment of pirates as outlaws by virtue of their lack of connection to any legitimate public authority is consistent with the contemporary development of the category of unlawful combatants by the Bush Administration. *See supra* at note 624.

[695] The modern principle of universal jurisdiction under international law holds that some crimes are so universally abhorrent that their perpetrators are hostis humani generis—enemies of all manking—and that jurisdiction may be based solely on obtaining physical custody over the perpetrators. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 494 ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even when none of the bases of jurisdiction indicated in § 402 [such as territoriality or nationality of the accused or victim] are present."). A state exercising universal jurisdiction prosecutes a criminal under its own law, rather than that of the state where the crime was committed, or under international law on the theory that the prosecuting state is acting on behalf of all mankind. The earliest origins of universal jurisdiction trace to the struggle against piracy. *See* 2 GROTIUS, LIBRI TRES, *supra* note 155, ch. 20; 1 E. VATTEL, LE DROIT DE GENS ch. 19 (1758). The principle of universal jurisdiction enjoys prominent place in many IHL treaties, including the Geneva Conventions. *See* GCI, *supra* note 398, art. 49;

and principles of natural law harkening to the ancients,[696] to capture and summarily kill pirates.[697]

Historically, barbarians disentitled themselves from the protections of the jus in bello, a body of regulation contracted as between legitimate public sovereigns, and in contemplation of the threat posed by the predations of pirates and others of their ilk, states claimed the sovereign prerogative to modify the scope of application of IHL to better enable the punishment of offenses against the "law of nations" and the defense of civilization against such attacks.[698] In the words of seventeenth cen-

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GCIII, *supra* note 398, at art. 146. For a thorough discussion of universal jurisdiction, *see generally* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX L. REV. 785 (1988).

[696] Renaissance commentators indicated that the basis for the assertion of universal jurisdiction over piracy had roots in the theory that pirates were morally akin to barbarians in that by existing beyond the scope of public law they committed the unpardonable sin of threatening the natural legal order constituting and defending civilization. *See, e.g.*, RUBIN, *supra* note 678, at 86.

[697] *See* CHARLES MOLLOY, DE JURE MARITIMO 40 (1677) at 40 (citing Royal Proclamation declaring "all pyrates and rovers" to be "out of [royal] protection, and lawfully to be by any person taken, punished, and suppressed with extremity"). Prior to the 19th century, pirates were typically condemned after a brief hearing and executed. *See id.* at 38 ("If Pirats . . . happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment by hanging them up at the main Yard end before a departure . . . So likewise, if the Captors bring [the pirates] to the next Power, and the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss, . . . the [pirates] may be there executed by the Captors."). Although pirates were afforded due process protections in the 19th century, states retained legislation permitting their summary trial and execution. *See, e.g.*, *In re Charge to Grand Jury-Treason*, 30 F. Cas. at 1049 ("[A]ll civilized nations . . . are under a moral obligation, to . . . suppress [pirates], . . . [who are] liable to be put to death for the suppression of their hostilities."). A series of treaties commit states to the suppression and punishment of piracy, and the pirate continues to be "treated as an outlaw . . . whom any nation may in the interest of all capture and punish." The Lotus Case, 1927 P.C.I.J. Series A., No. 10, at 70 (dissent); *see also* Convention on the Law of the Sea, Dec. 10, 1982, art. 100-10, U.N. Doc. A/CONF 62/122, *reprinted in* 21 I.L.M. 1261, 1288-89 (1982) (defining piracy as a crime of universal jurisdiction and requiring states to cooperate in its suppression and punishment).

[698] *See* Wedgwood, *supra* note 80, at 564 (stating that Article I, Section 8 of the United States Constitution granting power to Congress to define and punish piracy as well as offenses against the "law of nations" was framed to permit derogation from IHL in the case of pirates, a category of unlawful belligerents to whom the Framers did not intend to extend the protections of IHL). The exten-

tury scholar Emmerich Vatel, "[a]s for those monsters who . . . act as a scourge and plague of the human race, they are nothing more than wild beasts, of whom every man of courage may justly purge the earth."[699] Modern IHL, erected in service to the moral conviction that the most egregious war criminals are violators of norms of jus cogens and deserving of the most serious legal sanction available,[700] is at the very least permissive

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sion of Congressional jurisdiction to punish violations of the "law of nations" extends to the punishment of war criminals and provides the basis for the assertion of jurisdiction over enemies accused of pre-capture crimes. *See* U.S. CONST., art. I, § 8, cl. 10 (providing Congress with broad authority for trial of those who commit criminal offenses "against the Law of Nations" and thus creating the constitutional basis for creating tribunals to try enemy belligerents). With the Geneva Conventions of 1949 the United States accepted the obligation to extend to enemy belligerents charged with pre-capture offenses, regardless of their legal status, the benefits of the identical courts and procedures applicable to the prosecution of members of the United States Armed Forces for violations of IHL. *See* GCIII, *supra* note 398, art. 85. However, the United States Supreme Court ruled, prior to United States ratification of the Geneva Conventions, that an enemy belligerent is not entitled to this benefit for violations committed pre-capture, and has not revisited the question since 1945. *See In re Yamashita*, 327 U.S. at 22 (denying habeas corpus relief to enemy POW convicted by a military commission on ground that the "same courts-same procedures" rule from the Geneva Convention of 1929 did not apply to pre-capture offenses). Whether an unlawful combatant accused of pre-capture violations of the "law of nations," specifically violations of IHL, is entitled to the benefits of court-martial, as opposed to military tribunal, is hotly debated. For a critical discussion of the scope and source of legislative and executive powers to create tribunals to prosecute violations of the "law of nations," a contentious topic beyond the scope of this Article, see, for example, Martins, *supra* note 291.

[699] EMMERICH DE VATTEL, THE LAW OF NATIONS 132 (C.G. Fenwick trans., 1916). Terrorists are clearly the modern incarnation of pirates and outlaws and are on this basis subject to the same universal regime of punishment by any who apprehend them. *See id.* at 93 ("Men who by profession are poisoners, assassins or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations . . . . ").

[700] A norm of *jus cogens*, or a peremptory norm, is recognized by the entire international community as one from which no derogation is permitted and which cannot be modified save by a subsequent norm of general character. Norms of *jus cogens* limit state sovereignty and immunity in that the general will of the international community takes precedence over the individual will of states to order their international relations. *See* Vienna Convention on the Law of Treaties, May 23, 1969, S. TREATY DOC. NO. 92-1, 1155 U.N.T.S. 331 (entry into force Jan. 27, 1990) (defining norms of *jus cogens*); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. k, reporter's note 6 (1987) (defining jus cogens as a narrow subset of customary international law norms, including prohibitions against genocide, slavery, torture and terrorism, that sit

of the declaration of the authors of unlawful private acts of violence hostile to the natural legal order buttressing civilization—i.e., terrorists—as barbarians subject to death upon capture.[701] The precedents stretch to the Lieber Code:

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atop the international legal hierarchy and preempt conflicting treaties and norms). Many commentators insist that prohibitions against war crimes and crimes against humanity, acts which threaten to "subvert the very foundations of the enlightened international community as a whole," have ascended to the apex of the normative pyramid of international law, and that "those who commit war crimes are the contemporary hostis humani generis. S.Z. Peller, *Jurisdiction over Offenses with a Foreign Element*, *in* 2 A TREATISE OF INTERNATIONAL CRIMINAL LAW 5, 32-33 (M. Cherif. Bassiouni & Ved Nanda eds., 1973). The work of the post-World War II tribunals in identifying, prosecuting, and disposing of the principle architects of aggression, genocide, and war crimes consistent with the joint legal-moral theory that these acts constituted crimes against the entire international community supports the argument that war criminals are an anti-civilizational force. *See* Joyner, *supra* note 21, at 167-68 (arguing that Nuremberg and subsequent jurisprudence reinforces the claim that war crimes "violent and predatory actions that descend to the level of gross bestiality, ... offend the law of civilized states and have therefore been declared crimes against universal law.").

[701] Concerted post World War II efforts to immunize the conduct of broad categories of belligerents who do not meet the traditional requirements of combatancy (including open carry of arms, acceptance of obligations under IHL, responsible command structure, and a fixed insignia visible at a distance), including spies, saboteurs, and guerrillas, led, in part, to the development of the provisions in the Geneva Conventions and the Protocols Additional that confer additional protections upon these actors. *See supra* notes 215, 398-418 and accompanying text. A number of states, and the European Court of Human Rights, have accepted the view that these instruments preclude the trial of otherwise unprivileged belligerents for unlawful combatancy in domestic military courts. *See* David B. Rivkin & Lee Casey, *The Crime of Unlawful Combatancy*, JERUSALEM POST, Aug. 7, 2003, at 9 (reporting the British belief that the European Convention on Human Rights, to which Britain is a party, prohibits the use of military commissions to try "unprivileged" or "unlawful" combatants). Not all states, however, accept that these instruments have modified the international common law of war. *See supra* note 608 (discussing United States objections to various provisions of the Protocols Additional purporting to alter the law of unprivileged belligerency). Many states and commentators consider unlawful belligerents disentitled to treatment as POWs, and liable to prosecution, and execution, upon capture. *See* Nurick and Barrett, *Legality of Guerrilla Forces under the Laws of War*, 40 AM. J. INT'L L. 563 (1946) (restating traditional position with respect to unprivileged belligerents); L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 312 (2d ed. 1912) ("Since international law is a law between States only and exclusively, no rules of International Law can exist which prohibit private individuals from taking up arms and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileges of members of the armed forces, and the enemy has according to a customary rule of International Law the right to

> Men . . . who commit hostilities . . . without being part . . . of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting return to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers . . . are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.[702]

Furthermore, the historical practice of states with regard to reprisals against and trials of war criminals evinces that violations committed by soldiers in battle have long been considered serious assaults upon the integrity of the system of public law that justify death as the only condign punishment.[703] Although the Geneva Conventions and Protocols Additional reject the outlawry of and summary reprisal against guerrillas and others who abjure obligations under IHL[704] as archaisms in favor of an approach originating in the broadly protective law of human rights, terrorism calls into question whether recent expansions of the panoply of rights and privi-

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consider and punish such individuals as war criminals."); *The Hostages Trial: Trial of Wilhelm List and Others*, VIII U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 64-65 (William S. Hein Co. 1997) (1949) (holding that enemy combatants who fail to meet qualifications for privileged status may be prosecuted by their captors). The doctrine, as well as the legal consequences, of unlawful combatancy remain firmly ensconced in the domestic law of leading military powers, and "[b]y universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants." Ex parte Quirin, 317 U.S. 1, 30-31 (1942) (holding, in denying writs of habeas corpus, sabotage activities carried out by non-uniformed enemy personnel to be unlawful combatancy, that unlawful combatancy was violative of IHL and a war crime, and that unlawful combatants are "subject to trial and punishment by military tribunals"). To the category of unlawful combatants whom an armed force may prosecute and punish for hostile acts against can be added terrorists, who meet none of the criteria for lawful belligerency; this is the position taken by the Bush Administration in its classification of al Qaida terrorists captured in the War on Terror as "unlawful combatants." For a discussion of unlawful combatancy generally and as applied to the War on Terror, see *supra* note 624.

[702] *See* Lieber Code, *supra* note 12, art. 82.

[703] *See supra* notes 132-35 and accompanying text.

[704] *See supra* notes 402-03 and accompanying text.

leges to which terrorists are judged entitled presumes, contrary to fact, that they are susceptible to deterrence by legal sanctions,[705] or that they have a stake in the civilizational order that can be used to impel them to comply with IHL,[706] rather than a burning desire to destroy civilization and law itself.[707] Moreover, these instruments, along with the contemporary disfavor into which reprisal has fallen,[708] call into question whether the general legal principle of reciprocity, which maintains that to be a subject of law entitled to its privileges and protection one must in turn respect the legal privileges and rights of others,[709] or the principles of contract which postulate parties of equal legal capacity with co-dependent legal obligations[710] are any longer to be elemental to the theory underpinning IHL. If IHL is to be created and interpreted through an institutional framework so as to provide one set of rules, less restrictive and more protective of terrorists, and another, more restrictive of and more likely to impose criminal liability upon soldiers, IHL, and international law more generally, cannot inhabit an anarchic world where law is respected only in the breach[711] and power is again the sole convertible currency.[712]

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[705] The notion that criminals are amenable to deterrence by the prospect of punishment for their illegal acts is an argument hotly debated in domestic criminal law scholarship, and although some commentators suggest that "ordinary" would-be war criminals, as generally "'respectable' persons . . . highly esteemed by their superiors" and "not social outcasts or marginal people," can be deterred by legal sanctions, the extension of this hypothesis to terrorists—persons who "unlike ordinary criminals . . . belong to the category persons in need of being [sic] 'resocialized'" can be similarly deterred—has little support. VAN DEN WYNGAERT, *supra* note 26, at 205-06. Successful deterrence requires rational actors to reject those choices that will result in costs that exceed benefits and to elect those choices that produce benefits in excess of costs, and nonrational actors are exceedingly difficult to deter from criminality. *See generally* STEVEN MESSNER & RICHARD ROSENFELD, CRIME AND THE AMERICAN DREAM (1994); Chase, *supra* note 30, at 191 (maintaining that only rational actors can be deterred through the imposition of costs associated with the enforcement of law). Some, and perhaps most, terrorists, for whom the act of terrorism is itself an "ultimate satisfaction" and not always a rationally-determined means to a clearly-defined and reachable goal but instead the cause of their own destruction, are classically irrational. Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 518 (2003) (contrasting terrorists, "whose avowed tactics are wanton destruction and the targeting of innocents" and who actively seek martyrdom, with previous adversaries of the West, who were "status quo" and "risk-averse" in comparison); Louis Rene Beres, *Confronting Nuclear Terrorism*, *in* INTELLIGENCE AND INTELLIGENCE POLICY IN A DEMOCRATIC SOCIETY 181 (Stephen J. Cimbala ed., 1987) (suggesting that deterrence based upon the threat of apprehension and punishment is inapplicable to self-sacrificial terrorists).

[706] *See* Ralph Peters, *The New Warrior Class*, 24 PARAMETERS 16, 16 (1994) (analogizing terrorists to "erratic primitives of shifting allegiance, habituated to violence, with no stake in civil order").

[707] *See* Robert McFarlane, *Deterring Terrorism*, J. DEF. & DIPL., June 1985, at 63 ("Terrorism is a revolting . . . form of warfare directed against the very heart of civilization.").

[708] *See supra* notes 12, 133 and accompanying text (discussing reprisal under IHL and evaluating contemporary arguments as to its applicability).

[709] For a discussion of the general legal principle of reciprocity, see LON FULL-

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ER, THE MORALITY OF LAW 19-27 (1969). For a discussion of reciprocity in the structure and process of international law and international relations, *see* Robert O. Keohane, *Reciprocity in International Relations*, *in* ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY 132-57 (1989).

[710] The conception of IHL as a contract between warring parties carries with it the obligation to honor the contract and implies that failure of either party to do so constitutes a breach which entitles the other to declare the contract to no longer be in force. *See* Costas Douzinas, *Postmodern Just Wars: Kosovo, Afghanistan and the New World Order*, *in* LAW AFTER GROUND ZERO, *supra* note 81, at 25-31.

[711] The endemic shortcoming of international law is that in its positive rules and regulations it is too frequently divorced from the practical necessities and moral requirements of the actors that are the subjects of its concern, resulting in ineffectual law and a weakening of the principles and norms that underlie the rules and regulations it declares. For a discussion of this phenomenon, *see generally* DINAH SHELTON, COMMITMENT AND COMPLIANCE (1995). To the extent that the IHL has been unjustly bifurcated into distinct spheres of regulation, with one functionally supportive of terrorists and the other punitive with respect to the armed forces of states, it is not difficult to imagine that members of the latter group might come to view IHL as something artificial to be manipulated, or worse, ignored. *See* DAVID CHANDLER, FROM KOSOVO TO KABUL 158 (2002) ("The gap between 'justice' and what is 'legal' has led to the degradation of international law rather than to its development."). If law depends for its respect and observance upon the general perception that it is rational, functional, and just, IHL may be endangered. *See* OSIEL, *supra* note 23, at 134 (discussing dangerd posed to IHL by its inconsistency with the practical realities of modern warfare and by perceptions that it has departed from a position of fundamental fairness).

[712] The quest to transform international relations from a power-governed to a law-governed system is age-old and has contributed to the development of international legal institutions and conventions, including the Charter of the United Nations, the International Court of Justice, and the proposed ICC. *See* ANNE-MARIE SLAUGHTER, LEGALIZATION AND WORLD POLITICS (2003). However, although all forms of law rely upon at least some measure of voluntary compliance to lower the costs of policing the regime, international law, which cannot turn to a sovereign for enforcement, is, even more than domestic sources of law, a conciliatory

No military force will ever conduct its operations in perfect concord with IHL—quite simply, there are "limits to the amount of humanitarian observance that desperately fighting flesh and blood can stand,"[713] and no soldier or state in extremis is ever likely to privilege compliance with IHL over survival.[714] Nonetheless, the general observance of IHL by honorable soldiers fighting in defense of civilization is the behavioral variable which most clearly distinguishes civilized peoples from modern-day barbarians,[715] *a venal and intractable assemblage*

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law reliant upon voluntarism. For a general discussion of compliance, see EDITH BROWN WEISS, ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL LAW (1998); Harold Hongju Koh, *Why Do Nations Obey International Law,* 106 YALE L.J. 2632 (1997); ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); HAZEL FOX, EFFECTING COMPLIANCE (1993).

[713] BEST, *supra* note 20, at 349-50 (stating a truism that is untenable to the untutored but common sense to veterans).

[714] The "practical necessities, irrationalities, and uncertainties" of combat invariably impel some soldiers to elect self-preservation over compliance with IHL. Of the many horrors of war the frequency with which soldiers, who by all accounts are otherwise morally upstanding citizens, may be forced to contemplate and commit violations of IHL in combat in order to survive, is among the most unsettling to humanitarians. *See* TAYLOR, *supra* note 13, at 33 ("Otherwise law-abiding individuals will commit crimes in order to save their own lives; national governments will likewise break treaties and international rules, if necessary, for their own preservation. Intrinsically a desperate and violent business, war is not readily limitable in terms of the means to be used in its prosecution."). As unpleasant as this may seem to the uninitiated drafters of conventions and declarations, this has always been, and will always be, the practice of soldiers, and while it may not comport with the expectations of civilians it is entirely consistent with, and remediable to the extent remediation is necessary by, the martial code. *See supra* notes 118-36 and accompanying text (presenting principles upon which the martial code operates). Nonetheless, the phenomenon whereby soldiers engaged in combat with other soldiers occasionally transgress against a formal legal regime to which they generally adhere ought not be accorded the same degree of moral reprobation as the actions of terrorists, who deliberately target civilians and categorically reject IHL obligations.

[715] *See* Gross, *supra* note 45, at 446 (identifying respect for law as the cardinal distinguishing feature between Western democratic states and "terrorists who trample the law in their fight"). Although soldiers of Western democracies do not hold IHL sacrosanct, their violations of IHL are nonetheless exceptional, and their adherence the norm. The converse is true for terrorists, whose premeditated legal transgressions are standard operating procedure and whose end—the deliberate destruction of civilians and the legal regimes instituted to protect their rights—can never justify reciprocal derogation from obligations under IHL. *See* Gerstein, *supra* note 111, at 290 (contrasting soldiers, whose violations of IHL are

hors de loi ("outside the law")[716] that inhabits an utterly incompatible moral universe and that, by deliberately targeting innocent civilians permanently dislocates itself, along with its barbarian, piratical, and outlawed progenitors,[717] from the ranks of the civilized. One need not embrace the ancient ordination of territory into civilized and barbarian spheres to defend the assertions that morality, even during war, should march in step with law,[718] that the premeditated murder of innocents is ethically and juridically distinct from their unintentional killing, and that rather than accord terrorists enhanced status under the law defenders of civilization should withdraw the protections of the law they shun.[719] Nor need

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incidental to their mission, with the terrorist, who "not only violates the rights of others by violence, but . . . does so with the purpose of making everyone's rights insecure . . . . and destroy[ing] the community of understanding and mutual self-restraint upon which the existence of rights depends"). In short, the difference between soldiers and terrorists rests ultimately upon the morality of both means and ends.

[716] *See* George Aldrich, *The Hague Peace Conference: The Laws of War on Land*, 94 AM. J. INT'L L. 42, 47 (2000) (stressing the absolute irrelevance of law to the terrorists' ends and means); *see also* Baxter, *supra* note 12, at 333-34.

[717] *See* Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 181 (1945) (tracing the terrorist genealogy through barbarians to "bandits," "pirates," and "guerrillas").

[718] The philosophical position that, although the worlds of morality and law are perhaps impossible to conflate, particularly in war, the two, which reinforce each other and are essential to the preservation of civilization, should map together as closely as possible even in battle, dates to antiquity. *See, e.g.*, SUN TZU, ART OF WAR (Y. Shibing trans., 1994); V.S. SOLOVIEV, POLITICS, LAW AND MORALITY (W. Wozniuk ed., 2000). This position is at odds with the practice of contemporary IHL absolutism on a number of counts. *See infra* notes 758, 810 and accompanying text.

[719] Perhaps the most compelling argument for the divestiture or limitation of legal rights from terrorists rests upon the moral sense that to accord terrorists rights superior to those of their victims is fundamentally unjust:

> The terrorist makes himself vulnerable . . . in that he loses the moral title to complain of . . . [mal]treatment. Having a right consists precisely in having the title to command respect for our demands that others act or refrain from acting in particular ways towards us, and for our complaints when they fail to do so. The assertion of this title is inconsistent with the position into which the terrorist has put himself to the extent of his wrong-doing. For him to claim that his rights remain intact in spite of the harm he has done to others is for him to claim that he deserves to be left in a better position than his victims, and the unfairness of such a claim seems clear.

one lump all enemies together under the barbarian rubric: simply stated, barbarians are those who deliberately attack civilians to advance the destruction of a civilization based upon liberty, law, and respect for individual human rights and dignity.

B. Islamic Terrorists and Rogue-State Sponsors: Latter-Day Barbarians

With the fall of the Berlin Wall, Western liberal scholars reposed much faith in the prospect that a modern and universal civilization,[720] based upon Western norms and values such as liberty, individual rights, free markets, limited government and separation of church and state, and a legal culture[721] built upon the doctrine of the formal equality of all persons,[722] would emerge from decades of bipolar confrontation.[723] More pessimistic observers, anticipating that the collapse of Commu-

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Gerstein, *supra* note 111, at 292.

[720] "Civilization" refers to a human community that, although it may consist of a multiplicity of ethnicities, languages, and states, is united by common historical experiences, traditions, values, and beliefs that influence and determine a shared normative vision of domestic and international order, the goals that the community should collectively pursue, the values and objectives to be promoted and defended, and the means to these ends. *See* Jacinta O'Hagan, *Conflict, Convergence or Co-Existence? The Relevance of Culture in Reframing World Order*, 9 TRANSNAT'L L. & CONTEMP PROBS. 537, 539 (1999); *see also* Ali Ahmad, *The Myth of the "Islamic Threat to the West": Religion and Politics in the Middle East*, 15 J.L. & REL. 605, 605 (2000-2001) (defining "civilizational identity" as the "highest cultural grouping of people and the broadest level of cultural identity").

[721] *See generally* LAWRENCE M. FRIEDMAN ET AL., LEGAL CULTURE AND THE LEGAL PROFESSION 1 (1996) (defining "legal culture" as the prevailing "legal consciousness—attitudes, values, beliefs, and expectations about the law and the legal system" within a political community).

[722] *See id.* at 197-98 (championing Western universalist approach to post-Cold War global order as morally superior to non-universalist conceptions, insisting upon the necessity for moral judgment, and rejecting "cultural relativism").

[723] *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (elaborating thesis that the end of the Cold War and the introduction of the integrative forces of globalization heralded the dawn of a universal civilization); Sohail H. Hashmi, *International Society and Its Islamic Malcontents*, 20 FLETCHER F. WORLD AFF. 13, 13-14 (1996) (describing diffusion of norms, values, and principles of Western liberalism as necessary to the replacement of international anarchy with an "international society"); O'Hagan, *supra* note 721, at 540 (tracing Western universalism to 19th century evolutionary theories).

nism would yield a global order in which religion would become the primary constituent of civilizational identity and increased contacts would heighten tensions between largely incommensurable civilizations,[724] postulated a "clash of civilizations" in which burgeoning antagonisms, rather than Westernization, would fill the vacuum left by receding East-West tensions.[725] According to this civilizational conflict thesis, the principal fault line along which systemic upheaval can be expected lies between the West and Islam by virtue of stark dissimilarities between belief systems and legal cultures.[726] For Muslims, law is of divine origin and therefore incompatible with and supreme compared to a Western legal order that recognizes human reason and the will of the majority as sources of legitimate rule-making authority,[727] and perpetual conflict with the unbelievers of the dar-al harb is therefore divinely ordained.[728] Although it may shock untutored Westerners,[729] the history of Muslim efforts to conquer the "infidel" West, which commenced in seventh century Spain and continued through the medieval crusades to the present,[730] is very much with us, and, if the West is to survive, the civilizational conflict thesis holds that Westerners are duty-bound to awaken to the defense of their civilization against the growing Islamic military challenge.[731]

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[724] *See* Ahmad, *supra* note 721, at 605 (listing the major civilizations as Western, Islamic, Chinese, Eastern Orthodox, Japanese, Latin American, Hindu, and African).

[725] *See* HUNTINGTON, *supra* note 668, at 67-68 (elaborating his "clash of civilizations" thesis). This "clash of civilizations" thesis builds upon a skein of longstanding auto-critiques of Western universalism. *See* OSWALD SPENGLER, THE DECLINE OF THE WEST'S PERSPECTIVES OF WORLD HISTORY (Charles Francis Atkinson trans., 1928) (1922) (suggesting that the world consists of separate and self-contained civilizations pursuing independent histories rather than a universal history); *see also* Tay, *supra* note 665, at 195 (suggesting that the "multiculturalist" rejection of Western universalism is rooted in the "mystical belief . . . that every people has a specific and special 'genius' and way of life and that all . . . foreign legal influence is a violation of its soul.").

[726] Whereas Western legal systems aspire to the incorporation of universal and rational principles, Islamic law is a "status group law" that rejects reason in favor of faith and universalism in favor of limitation to a community of believers. MAX WEBER, LAW AND ECONOMY IN SOCIETY 241-43 (1954). Although the civilizational conflict thesis concedes ground to universalism by declaring that the central distinction to be drawn is between the West as the dominant civilization and the "non-Western many," it nevertheless maintains that the primary zone of conflict lies at the conjunction of Western and Islamic civilizations. *See* HUNTINGTON, *supra* note 668, at 36, 40-41 (describing Islamic and Western legal cultures as "particularly at odds" due to marked conflicts over the relative importance of individual rights and the relationship between church and state).

[727] SHIREEN T. HUNTER, THE FUTURE OF ISLA AND THE WEST:CLASH OF CIVILIZATIONS OR PEACEFUL COEXISTENCE? ix (1998) (identifying source of irreconcilable conflicts between the Muslim and Western theories of political and legal legitimacy); see also Hamid M. Khan, Note, *Nothing is Written: Fundamentalism, Revivalism, Reformism, and the Fate of Islamic Law*, 24 MICH. J. INT'L L. 273, 317-29 (2002) (describing incompatibilities between the Islamic conception of law as divinely-ordained and public international law—essentially a Western creation—as

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fashioned by treaties, customs, and the teachings of jurists); JOSEPH I. COFFEY & CHARLES T. MATHEWES, RELIGION, LAW, AND THE ROLE OF FORCE 56 (2002) (noting widely-shared Muslim sentiment that international law is incompatible with Islamic law and therefore "alien").

[728] Islam conceives of the world as divided into two spheres: the *dar al-islam* (abode of peace), in which dwell the Muslims, and the *dar al-harb* (abode of war), the realm of the unbelievers. FAROOQ HASSAN, THE CONCEPT OF STATE AND LAW IN ISLAM 206 (1981). Faithful Muslims are commanded to take up *jihad* and wage perpetual war with *dar al-harb* to defend and spread the faith. *See* Index Islamicus, *at* http://www.libnet.ac.ilb/~libnet/IndexIslamicus.htm (last updated June 8, 2003) (elaborating the *dar al-islam/dar al-harb* distinction); *id.* at (defining "jihad" as the duty of a Muslim to struggle in defense of the faith); Khan, *supra* note 728, at 308 (explaining that Islam justifies war against the *dar al-harb* because non-Muslim societies establish men and laws, rather than God, as sovereign). The Qur'an clearly delineates one set of duties owed to fellow Muslims and another to unbelievers. *See, e.g., Surah* 8:57 (commanding Muslims to discriminate between fellow Muslims and non-Muslims with respect to the taking of prisoners); Surah 47:4 (requiring Muslims to kill non-Muslim combatants as punishment for infidelity to God). For an extensive discussion of the militance inherent in Islam, as well as of the call to *jihad* that animates Islamic terrorism against Western civilization, *see* Barry Feinstein, *Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation*, 11 J. TRANSNAT'L L. & POLICY. 201 (2002).

[729] *See* DANIEL BENJAMIN & STEVEN SIMON, THE AGE OF SACRED TERROR 384 (explaining that, after a long respite from religious warfare, the conception of religion as a violent variable in world history has become alien to the Western mind).

[730] HUNTINGTON, *supra* note 668, at 256. The historical and cultural context is important: modern Islamic terrorists do indeed view themselves as heirs to the legacy of the Muslims who defeated medieval Christian crusaders. Cole, *supra* note 4, at 95.

[731] The social contract theory of the creation of Western liberal democracies posits that states are instituted primarily to protect the lives and property of their citizens. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689). A logical corollary of the duty of the state to protect its citizens is the duty of the state to work in concert with other liberal democracies in their collective defense, and it is this duty to which scholars refer in challenging the West to unify against the

Still others treat the suggestion that differences between civilizations necessarily translate into violent conflict as a gross oversimplification.[732] They stress that Islam is akin to Judaism and Christianity in ascribing to the divinity all legitimate authority to order the affairs of mankind[733] while utterly proscribing acts of murder;[734] they insist further that the con-

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Islamic civilizational threat. *See* HUNTINGTON, *supra* note 668, at 311 (charging Westerners with the "duty" to achieve greater political, economic, and military integration the better to restrain the development of Islamic military power); *see also* Regis Debray, *Letter from America,* 19 NEW LEFT REV. 29, 31-32 (2003) (suggesting that Western civilization must draw closer to defend against an assault by the combined forces of Islamic as well as Sinic civilizations—"Confucius plus Allah").

[732] *See*, e.g., Jacinta O'Hagan, *Civilisational Conflict? Looking for a Cultural Enemies*, 16 THIRD WORLD Q. 19, 19 (1995) (criticizing inevitable intercivilizational conflict thesis as a simplistic reduction of the complexity of international relations and an attempt to "look for enemies").

[733] The most fundamentalist Muslims purport to be the bearers of the absolute revealed truth of the Creator. Gerstein, *supra* note 111, at 68. However, in this regard they are no different from the orthodox among their spiritual forebears, Jews and Christians. HUNTER, *supra* note 728, at ix.

[734] According to perhaps the foremost Western expert on Islamic law and history:

> At no point do the basic texts of Islam enjoin terrorism and murder. At no point . . . do they even consider the random slaughter of uninvolved bystanders . . . [The 9/11 terrorism] has no justification in Islamic doctrine or law and no precedent in Islamic history . . . These are not just crimes against humanity and against civilization; they are also acts—from a Muslim point of view—of blasphemy, when those who perpetrate such crimes claim to be doing so in the name of God . . . .

BERNARD LEWIS: CRISIS OF ISLAM 154 (2003).

Furthermore, although Christianity, with its just-war doctrine, is more closely associated with the development of IHL than is Islam, defenders of the latter can point to the sacred text of Judaism and Christianity to argue it is these religions, not Islam, that embrace terrorism and mass murder. *See, e.g.*, *Deuteronomy* 7:1-5:

> When the Lord your God brings you into the land which you are entering to take possession of it, and clears away many nations before you . . . and when the Lord your God gives them over to you, and you defeat them; then you must utterly destroy them; you shall make no covenant with them, and show no mercy to them . . . [Y]ou shall break down their altars, and dash in pieces of their pillars, and . . . burn their graven images with fire.

Deuteronomy 7:1-5; *see also* M. JUERGENSMAYER, TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE (2000) (identifying religiously-inspired terrorist movements emanating from within the Christian, Muslim, Sikh, and Buddhist faiths). *But compare Exodus* 12:48-49 ("And when a stranger shall sojourn temporary resurgence of Islam is simply an assertion of religiosity that can be harmonized with, or at least exist in harmless parallel to, Western civilization,[735] and that, far from hinder the development of democracy, fidelity to Islamic teachings will, more than any other social practice or institutional commitment, catalyze the liberal democratization of the Middle East.[736] Moreover, they clearly distinguish a liberal strain of Islamic thought[737] from the schismatic teachings of an untutored, if charismatic, minority,[738] and reject the idea of a monolithic ummah dedicated to destroying the West.[739] Even

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with you and would keep the passover to the Lord, . . . he shall be as a native of the land . . . . There shall be one law for the native and for the stranger who sojourns among you.").

[735] *See* Khan, *supra* note 728, at 299, 307 (describing modern Islamic revivalism as a benign cultural awakening); ROBERT D. KAPLAN, THE ENDS OF THE EARTH: FROM TOGO TO TURKMENISTAN, FROM IRAN TO CAMBODIA—A JOURNEY TO THE FRONTIERS OF ANARCHY 107 (1996) (presenting Islam as a compassionate source of social cohesion and moral instruction).

[736] For a refutation of the view that Islam is anathema to civilizational coexistence with the West, as well as an extended presentation of Islam as consistent with and key to democracy, see NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY (2003).

[737] Hashmi, *supra* note 724, at 23 (describing attempts of intellectuals to accommodate Islamic ethics with a modern social world).

[738] Most religious "scholars" who condone terrorism—a small minority within the Islamic faith—are adherents to Wahhabism, a "narrow, intolerant, rigid, literalistic, and puritanical" sect of Islam that is extremely hostile to intellectualism, modernity and above all Western culture, which they blame for the numerous difficulties that plague Islamic societies. Khan, *supra* note 728, at 307; *see also* HUNTER, *supra* note 728, at viii (lamenting terrorism as one of the "tragic uses to which Islam has been put" to foster intercivilizational enmity). These new Islamic fundamentalists, a group that includes Usama bin Laden of al Qaeda and Mullah Muhammad Omar of the Taliban, are concerned less with the well-being of their societies than with their cults of personality. RASHID, *supra* note 456, at 3. Courageous mainstream clergy, adamant that Islam is a religion of social justice categorically opposed to terrorism, charge this radical sect with rejecting Islamic tradition, custom and the Qur'an itself in propounding apostasy. *See id.* (differentiating political terrorism of radical Islamists from the religious piety of traditional Islamic scholars); Hugo Young, *It May Not Be PC to Say*, GUARDIAN, Oct. 9, 2001, at 24 ("Islam has been hijacked by a discourse of anger and a rhetoric of rage.") (quoting Islamic scholar Iman Hamza).

[739] Scholars of Islam stress that the ummah—the billion members of the world Islamic community—is no more unified than are the adherents of any other religion. *See* HUNTER, *supra* note 728, at 7-8, 14-18 (rejecting the notion that the *ummah* acts as a single political bloc); Kishore Mahbubani, *The Dangers of Deca-*

if Muslim states miraculously unified,[740] any transhistorical conflict has withered along with the potential for any such coalition to muster sufficient military power to pose a credible threat.[741] In short, the explanation of Islam as a cultural orientation[742] maintains that there is simply no Islamic civilizational approach to law or politics and nothing to fear from Islam ascendant, and United States Middle Eastern policy is more squarely within the chain of causation of September 11th than the twisted version of the religion professed by those who piloted the final instruments of that tragedy.[743]

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dence, 72 FOR. AFF. 12, 12-14 (1993) (dismissing the adhesiveness of pan-Islamic sentiment as applied to geopolitics); Fouad Ajami, *The Summoning: "But They Said, We Will Not Hearken*," 72 FOR. AFF. 1, 8-9 (1993) (explaining that "the world of Islam divides and subdivides"). Moreover, "there are growing numbers of Muslims . . . who desire nothing better than a closer more friendly relationship with the West." LEWIS, *supra* note 735, at 47; JESSICA STERN, TERROR IN THE NAME OF GOD (2003) (same). Even if Islam imposes a *dar al-islam/dar al-harb* distinction, the Qur'an explicitly establishes that the duty of *jihad* is purely defensive; aggression is categorically proscribed. *See* Abulaziz A. Sachedina, *From Defensive to Offensive Warfare: The Use and Abuse of Jihad in the Muslim World* (forthcoming) (positing the defensive interpretation of jihad).

[740] Although the Organization of the Islamic Conference was formed in 1969 to further cooperation between Islamic states, no unified program has yet been crafted or proposed by that or any other entity. *See* Hashmi, *supra* note 724, at 18 (discussing disunity that characterizes relations within the community of Islamic states since the fall of the Caliphate in the 11th century).

[741] *See generally* FRED HALLIDAY, ISLAM AND THE MYTH OF CONFRONTATION (1996).

[742] The image of Islam as a military program calling for the defense of Islamic civilization by subjugation of non-Muslims is starkly contrasted with that of Islam as a set of customs and values around which to order a just society, and the vast majority of Muslims express their faith in the latter tradition. *See* JOHN CLARK MEAD, THE NEW WORLD WAR 47-95 (2002) (elaborating distinctions between majoritarian "cultural Islam" and the "militant Islam" of a small minority).

[743] *See* John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind Anti-American Thought*, 63 U. PITT. L. REV. 815 (2002) (arguing because the U.S. has supported Israel and allegedly suppressed Arab self-determination, it is partly responsible for September 11th and other acts of violence against United States targets in recent years); *see also* PAUL BERMAN, TERROR AND LIBERALISM (2002) (presenting and criticizing arguments that United States capitalist foreign policy is responsible for creating the hatred that produced September 11th). Critics of the impulse to find the origins of September 11th in the consequences of United States foreign policy counter with the contention that the perpetrators of the unspeakable horrors of that day simply "loathe [the West] because of who we are and what our society represents," namely respect for individual liberties, religious tolerance, and a political system governed by secular

Whether Islam is a call to jihad or merely a call to prayer is an open question.[744] Islamic terrorism may eventually be revealed as a treatable, although severe, symptom of regional societal dysfunction,[745] yet it may also be the logical outgrowth of an agenda of conquest laid down by Muhammad in medieval Mecca.[746] Nevertheless, it is unnecessary to prove

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law. ELSHTAIN, *supra* note 663, at 3.

[744] A clear distinction can be drawn, and is so drawn, for purposes of this Article between Muslims and terrorists. In the immediate aftermath of September 11th, the United States took the official position that it is terrorists who profess to be Muslims, and not the Islamic faithful, who threaten not only the West but the Muslim faith itself:

> We respect your faith. It's practiced freely by millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah. The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself.

President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001). This view is shared by religious scholars as well:

> To suppose that the Islamic faith . . . somehow lead[s] men . . . to be capable of flying an airliner full of passengers into a building crowded with unsuspecting civilians, is deeply denigrating to Muslims . . . . It requires us to suppose that Muslims . . . lie almost beyond the borders of a shared humanity . . . simply because they are Muslims . . . .

David S. Yeago, *Just War: Reflections from the Lutheran Tradition in a Time of Crisis*, 10 PRO ECCLESIA 401 (2001).

Still, not all scholars believe the War on Terror can be neatly cabined to shield the broader Islamic civilization from violent clash with the West. *See, e.g,* Francis Fukuyama, *Their Target: The Modern World*, NEWSWEEK, Dec. 17, 2001 (arguing Islam is fundamentally hostile to secular civilization and that the conflict in which the United States is embroiled is "not simply a 'war' against terrorists" but is in fact a "much broader" conflict between modernity and anti-modernity).

[745] *See* Craig Hall, *The Wake-Up Call of Terrorism*, 36 INT'L LAW. 125 (2002) (suggesting that non-religious factors such as economic deprivation and a lack of education are the root causes of terrorism and must be resolved to prevent future attacks).

[746] For arguments elaborating the latter position, see BENJAMIN NATANYAHU, HOW THE WEST CAN WIN 8-9 (1986) (asserting a causative relationship between "Islamic radicalism" and much of the terrorism of the 20th century); Laurie Goodstein, *Seeing Islam as "Evil" Faith, Evangelicals Seek Converts*, N.Y. TIMES, May 27, 2003, at A1 (reporting the popularization of the impression of Islam as a "very evil and wicked religion" and a global threat based upon its textual support for terrorism); Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL'Y & L. 345, 348-49 (2003) (highlighting and condemning as an act of "moral panic" the rhetoric by Christian groups demonizing Muslims as predatory pedophiles, based on a questionable interpretation of the life and teachings of

the civilizational conflict thesis or probe the motives of individual terrorists[747] to establish that the entire Society of Peoples[748] is under assault by the recrudescence of atavistic foes who abjure all restraint and brandish a radical religious vision as both weapon and justification for the deliberate mass murder of innocents.[749] September 11th demonstrated something far more profound than the futility of employing laws to deter wicked miscreants who value their own lives no more than those of their hapless victims and for whom no depredation is beyond contemplation:[750] that tragic morning during which

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Prophet Muhammad, offered in justification of registration of Muslims as a precursor to their future internment in response to anticipated acts of domestic terrorism by Muslim Americans) (citing numerous sources).

[747] Still, a *fatwa* (religious command) issued by Usama bin Laden and leaders of other Islamic terrorist groups declaring that to "kill the Americans and their allies—civilians and military—is an individual duty for any Muslim who can do it in any country in which it is possible to do it" supports the thesis that these terrorist groups, at the very least, are in civilizational conflict with the West. Usama bin-Laden et al., *Text of Fatwah Urging Jihad Against Americans*, AL-QUDS AL-ARABI, Feb. 23, 1998. The reaction of bin-Laden to the events of September 11th further underscores this point. *See* Statement from Usama bin-Laden, to Al-Jazeera Television (Oct. 7, 2001), *available at* http://www.pbs.org/newshour/terrorism/international/binladen_10-7.html ("Here is America struck by God Almighty . . . [T]hanks be to God . . . . God has blessed a group of vanguard Muslims, the forefront of Islam, to destroy America."). Moreover, a recent study consisting of interviews of Islamic terrorists suggests that the destruction of the West and the "recover[y] of [a] lost civilization, to recover the golden age of Islam," is their overarching mission. STERN, *supra* note 740, at 136.

[748] *See* JOHN RAWLS, THE LAW OF PEOPLES 3-37 (1999) (defining the "Society of Peoples" as those states that observe treaties, observe the duty of nonintervention, refrain from war except in self-defense, honor human rights, and assist others).

[749] The terrorist group al Qaeda, relying on its interpretation of Islamic law, explicitly rejects political solutions to disputes with the West and advocates unrestricted murder of citizens of the United States and other Western governments. *See* AL QAEDA TRAINING MANUAL 4, *available at* http://www.usdoj.gov/ag/trainingmanual.htm ("The confrontation that we are calling for with the apostate regimes does not know Socratic debates, Platonic ideals nor Aristotelian diplomacy. But it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun."). For such organizations, Islam offers "carte blanche justification for going to war . . . without concern for limitations upon its means," and terrorism is "divinely sanctioned." COFFEY & MATHEWES, *supra* note 728, at 30 (discussing 1998 Usama Bin Laden fatwah calling for terrorist acts against United States citizens and property).

[750] The architects of September 11th and their ideological progeny are vicious murderers who "have acquired a taste for killing, . . . [and] are capable of atrocities that challenge the descriptive powers of language." Peters, *supra* note 707,

over 3000 innocent men, women, and children were deliberately immolated by 19 suicidal Islamic terrorists heralded a paradigmatic shift toward an era of asymmetrical warfare[751] in which enemies of the United States and its allies, absolutely incapable of gathering armed forces to meet and defeat regular armies on the field of battle, will instead employ unconventional methods in an attempt to overcome their political will[752] and undermine the further transmission of the liberal Western mode of governance.[753] Terrorism and WMD are merely the more obvious and tangible weapons. It is somewhat paradoxical,[754] although consistent with the historical development of

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at 24. They are irrevocably bent on "destroy[ing] an impure world and bring[ing] about the apocalypse," and no means are beyond limits. Crenshaw, *supra* note 111, at 411. The deliberate targeting of innocent women and children, and the conscription of children as warriors in the cause, are but two of their more heinous means and methods for destroying the West. *See* Justus Reid Weinder, *The Use of Palestinian Children in the Al-Aqsa Intifada: A Legal and Political Analysis*, 16 TEMP. INT'L L. & COMP. L.J. 43 (2002) (describing employment of propaganda and educational incitement to induce Palestinian children to engage in acts of terrorism, including suicide bombing of civilian targets); *see also* ILENE COHN & GUY S. GOODWIN-GILL, CHILD STORIES: THE ROLE OF CHILDREN IN ARMED CONFLICT (1994) (same); Cal Thomas, *America is in Denial about the Mandate to Destroy Us*, INDIANAPOLIS STAR, Oct. 23, 2003, at A13 (surveying recent calls from Islamic clerics and leaders to destroy the West for its alleged infidelity to the true faith).

[751] *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT VISION 2010 (1996) (defining asymmetrical warfare as attempts to circumvent or undermine an opponent's strength while exploiting his weaknesses using methods that differ significantly from the opponent's usual mode of operations.).

[752] The notion that non-state actors might possess the capacity to initiate an armed attack against a state of sufficient magnitude as to vest themselves with a form of international legal personality under IHL and the U.N. Charter had been discussed very little prior to September 11th. *See* Yutaka Arai Takahashi, *Shifting Boundaries of the Right of Self-Defense—Appraising the Impact of the September 11 Attacks on the Jus Ad Bellum*, 36 INT'L LAW. 1081 (2003) (noting that international law has required that aggression stem from a state) (citing G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 19, at 142-43, U.N. Doc. A/9619 (1974)).

[753] *See* William H. Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 319 (2003) (identifying intent of 9/11 terrorists as "to undermine civilized society's way of seeing the world and attempting to govern it.").

[754] That IHL should be perverted from humanizing regime to weapon of war by terrorists is perhaps not so much paradoxical as ironic if one considers that agreements as to limitations on warfare presume shared interests and the capaci-

the analytical concept of "barbarians" as those beyond the shadow of law, that it should be IHL itself—or, more properly, the asymmetry in compliance as between the terrorists, who proclaim their divorce from any legal obligations and flout the rules of IHL to their advantage,[755] and the Western populations they target, for whom law is a central ordering principle—that bristles as the most potent weapon in the Islamic terrorist arsenal.[756] Nonetheless, because a concatenation of "reforms" over the last several decades, coupled with the ascendance of IHL absolutism, have delivered IHL into the hands of terrorists who now wield it as a sword against civilization,[757] the moral essence of the law must be reclaimed and decocted from accumulated ideological accretions if it is to once again shield civilization against barbarism. Accordingly, the next section crafts a legal strategy to empower the robust application of military force in defense of global order and liberty.

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ty to reach rational understandings with enemies who, if such shared interests and understandings were possible, would not likely be enemies.

[755] *See* Lewis, *supra* note 88 (enumerating recent violations of IHL by irregular unlawful combatants during the Liberation of Iraq).

[756] Observance of IHL would deny terrorists the very methods and means of war essential to engaging their enemies on something approximating an equal plane, and consequently they reject its application. *See* W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 81, 86 (2003) (contrasting practical disparity between the legal restraints occasioned by IHL upon territorial states, who are subject to the "dynamic of reciprocity and retaliation" that underlies international relations and who publicly accept legal limitations upon their capacity to respond to terrorist depredations, with terrorist groups and other nonstate actors who are difficult for states to locate and target in retaliation and who deny any legal restraints upon their actions). By selectively violating and then exploiting lacunae and ambiguity in IHL to their military and especially political advantage, terrorists convert IHL from a shield to a sword. *See* Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 89-90 (1989) (arguing that IHL ultimately serves terrorists' interests); Aldrich, *supra* note 608, at 3 (expressing qualified support for the argument that, in light of the Additional Protocl I, the West is prejudiced not merely by disparities in compliance as between terrorists and liberal democracies but by the structural and normative foundations of IHL which are evolving in favor of the protection of terrorists).

[757] The contention that law is an instrument of coercion just as much as is military force dates at least to the Renaissance. *See, e.g.*, MACHIAVELLI, *supra* note 5, at 99 ("There are two ways of fighting: by law and by force.").

C. Reforming IHL to Meet the Barbarian Threat: A Functionalist Argument

IHL, just as any other regime of legal regulation, is an ongoing functional response[758] to existing and anticipated factual circumstances. It is designed and interpreted in light of the capacities, interests, objectives, and "felt necessities" of politically relevant actors[759] to the benefit of whom it disproportionally redounds.[760] However, the matrix of costs and benefits under all legal regimes tend to be kinetic, rather than static: under the metamorphic pressures exerted by human rights NGOs and other absolutists over the last generation it is not surprising that IHL has been warped in ways that have redistributed the costs and benefits attendant to particular tactics, strategies, and weapons systems.[761] Nevertheless, the process whereby IHL is subject to reconstruction is omnidirectional, and when states, the principal authors of international law for centuries, can "no longer assure their defense within the ambit of inherited law, those charged with national defense [will] inevitably demand changes in [IHL]."[762] Thus, if even the remotest possibility exists that IHL, unwisely reformed to suit the felt needs of the human rights community and subject to interpretation and application in the hostile politico-legal milieu of the ICC, could be slaved to the sheltering of terrorists and rogue-states bent on the annihilation of millions of innocents and the criminalization of the reasonable acts of honorable soldiers protecting civilization itself against holocaust, IHL is, as the United States has effectively declared in renouncing the ICC, a compromised and dysfunctional legal regime.[763] That IHL should ever be marshaled to gainsay the assertion that the Private Ryans and Captain Ryans of the world are at critical moments the sole bulwark standing between civilization and unremitting evil, and that law should ever be permitted to punish virtuous soldiers who brave danger in a long twilight struggle against terrorist adversaries who flout the law as but a bothersome trapping of the civilization they aim to eradicate would be farcical if it were not so disconcerting. In short, civilization is bracketed between the danger inherent in the order that the ICC might well impose and the disorder engineered by terrorists,[764] for whom IHL is but the substrate for evil.

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[758] The social theory of functionalism maintains that society is a set of interrelated institutions and norms each of which has a particular essential purpose to the existence and operation of the social whole; society is analogous to a living organism. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893) (positing a general functionalist theory); RICHARD MERTON, MANIFEST AND LATENT FUNCTIONS (1957) (elaborating modern theory of functionalism). Functionalism postulates that law is the mechanism that structures expectations and secures compliance with a set of socially desirable norms, principles, rules and procedures at the lowest possible cost, and that the need to resort to coercive enforcement to secure compliance with this set of norms marks the weakness, and even failure, of the law. *See* MICHAEL BARKUN, LAW WITHOUT SANCTIONS 87-88, 157 (1968) (describing law as authoritative and normative statement of "paths over which the affairs of [a] community are carried on" and stating that the overriding function of law is "preservation of order" and the "ordering [of] social relationships"). IHL functions as the mechanism whereby application of force to the resolution of otherwise intractable disputes is, via a set of rules, prevented from destroying the objects, norms, and principles constitutive of civilization without rendering that application of force in the defense of civilizational values impracticable. *See* Douglas Cassel, *Does International Human Rights Law Make a Difference?,* 1 CHI. J. INT'L L. 121, 126-30 (2001) (stating that international law functions to deny moral relativism and to establish and defend normative transnational preferences against violators). IHL thus simultaneously enables, yet limits, the destruction attendant to war the better to secure civilizational security. For a thorough discussion of (neo)functionalist theory, see JURGEN HABERMAS, THEORY OF COMMUNICATION ACTION (1984). For a defense of functionalist theory against critics, see MICHAEL FAIA, DYNAMIC FUNCTIONALISM (1986).

[759] Reisman, *supra* note 82, at 81.

[760] Id. ("[E]very legal regime perforce benefits some actors more than others. . . .").

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[761] *See supra* notes 404-07 and accompanying text (discussing effects of purported post-1977 modifications to conventional and customary sources of IHL and the legal debates as to whether such modifications create enforceable obligations); *see also* discussion *infra* Part III.D (same); Reisman, *supra* note 82, at 81 (describing "tensions between formally prescribed [IHL] from a previous period and contemporary [IHL]").

[762] Reisman, *supra* note 82, at 81.

[763] *See* John Strawson, *Introduction in the Name of the Law*, *in* LAW AFTER GROUND ZERO, *supra* note 80, at xi (conceding that IHL has been revealed post-September 11th as "feeble" and "fragile as our world order"); *id.* (describing the Bush Administration view as the position that "we [are] at a now foundational moment at which existing legal norms and institutions are either irrelevant or questionable" and that IHL is dysfunctional or even harmful to the task of defeating terrorism). The argument that IHL may "actually worsen the problems [it was] crafted to redress," although it is a "radical critique of international law," deserves empirical evaluation. Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 171 (2003).

It is thus logical that those states predominantly responsible for civilizational defense would assume the van in demanding the revision, and even the broader rethinking, of IHL and the institutions responsible for its enforcement.[765] The salvation of Western civilization depends upon victory in the war on terror; in turn, this calls into question whether the (primarily United States) soldiers defending civilization, although they must as a moral imperative cleave as closely as practicable to the humanitarian purpose of the IHL regime,[766] may employ allegedly prohibited methods and means or otherwise derogate from a body of law never tailored for this sort of conflict[767] in order to guarantee victory. To be sure: the

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[764] *See* THE COLLECTED WORKS OF PAUL VALERY (Jackson Mathews ed., 1975) ("Two dangers constantly threaten the world: order and disorder.").

[765] *See* Rudolf Dolzer, *Clouds on the Horizon of Humanitarian Law?*, 28 YALE J. INT'L L. 337, 338 (2003) ("[I]t is unrealistic to expect that states, targeted by radical fundamentalists, will draw the lines in their defensive actions, and their strategies in general, precisely in accordance with the humanitarian values which have informed [IHL]."). Moreover, not all states have an equal stake in this reformulation of law, and responsibilities do not rest equally upon them: although states enjoy formal equality under international law, the notion that declarations of custom offered by states that do not engage in armed conflict and have no direct responsibility for the defense of civilization is inconsistent with the practical reality of the context presented by the War on Terror. *See supra* note 96 and accompanying text. It falls to those states primarily able and willing to take the lead in reformulating IHL to meet the functional demands of the War on Terror.

[766] Deontological scholars, even if they accept the assumption that the defeat of terrorism is an end very much preferable to the alternative, challenge this utilitarian assertion that it is possible to derogate from the IHL regime where absolutely necessary in order to prevail without abdicating the moral high ground and denaturing the moral force of the rule of law. *See* Gross, *supra* note 45, at 465 (contrasting the deontological and utilitarian perspectives on IHL). However, although it is preferable that the defeat of terrorism complement, rather than erode, IHL, if ultimate victory requires derogation under limited and precisely defined circumstances, it would seem a small price to pay.

[767] *See id.* at 469 (arguing that because IHL was never designed to apply against terrorists, one must look outside IHL to determine whether a state can ever incur a moral duty to overlook IHL in order to protect its own citizens against terrorists); *see id.* at 484-85 (answering in the affirmative by stating that "[t]errorism . . . thereby forces upon us a 'regime of necessity' whereby we are

United States remains unwaveringly committed to the observance of IHL during the conduct of post-September 11th operations in the asymmetrical war on terror.[768] However, September 11th revealed that the defense of vital national and civilizational interests are in tension with a cascading series of constraints on United States freedom of military action[769] that, although they spring from noble impulse, have neutralized the comparative military advantage of the United States and handicapped its policy options against terrorism beyond the danger point.[770] At first blush it seems we are enmeshed in a moral dilemma from which escape requires a Hobson's choice:[771] either jettison IHL, suspend all normative restraint, and sacrifice the higher moral terrain to a counter-jihad against terrorism, or scrupulously observe a regime whose demise will be but a mere incident to the ritual suicide of the civilization from whence it emerged. The first choice conflates the distinction between combatants, debases the civilization for which the war is fought, and confers a victory upon the terrorists, whose re-creation of us in their own image would as-

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compelled to put aside guiding moral principles in favor of a moral duty to protect the lives of the citizens of the free world."). For examples of the unsuitability of IHL in its current incarnation to the War on Terrorism, *see infra* Part III.D.

[768] *See* CJCSI 5810.01B, *supra* note 639 (insisting that the "Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized"). The United States commitment to the observance of IHL, however, does not imply United States recognition of the full panoply of legal obligations, particularly of the customary variety, that IHL absolutists would impose through the operation of the ICC. *See supra* note 624 (discussing disagreements over the parameters of IHL).

[769] *See* Adda B. Bozeman, *U.S. Conceptions of Democracy and Security in a World Environment of Culturally Alien Political Thought: Linkages and Contradictions*, *in* U.S. DOMESTIC AND NATIONAL SECURITY AGENDAS INTO THE TWENTY-FIRST CENTURY 55 (Sam C. Sarkesian & John Mead Flanagan eds., 1994) (tracing progressive United States auto-imposition of constraints on the use of force as evidenced by treaties, practice, and the declarations of public officials).

[770] *See* BARNETT, *supra* note 96, at 80 (contending that United States membership in IHL conventions has the "effect of removing options from the board" and offering potential adversaries who do not adhere to these conventions opportunities to their asymmetrical advantage); *see also* Bozeman, *supra* note 770, at 55 (warning that the Western understanding of IHL is dangerously "out of date").

[771] A Hobson's choice is the obligation to choose in a situation in which there is no available choice that is free of attendant guilt and responsibility for resultant evils. *See* Thomas Nagel, 1 PHIL. & PUB. AFF. 123, 143 (1972).

suage their defeat on the battlefield. The second abdicates moral responsibility to the abjectly immoral and orders the sworn defenders of civilization to orchestrate its passage into the gloom of a darker and more fearful age.

In short, a fissure has expanded into a chasm dividing what is generally deemed lawful under IHL from what might be charged as unlawful, although it can legitimately be described as the morally just conduct of soldiers.[772] This disjunct threatens, in synergy with the ICC, to swallow up respect for, and observance of, law more generally. However, although this is unquestionably a moment of fragility and perhaps even decision for international order, there is a narrow course that will maximize national and global welfare that can be navigated between these moral shoals: rather than deify IHL, as the absolutist framers of the ICC in their subsumption of its authorship from state[773] would have us do, we should accord it our

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[772] That objectively just conduct could ever be characterized as unlawful is an indictment either of the moral character of the community that created the law or of the institutions wherein the conduct adjudged unlawful. For a discussion of evil legal systems, see generally RONALD DWORKIN, JUDICIAL OBLIGATION AND THE RULE OF LAW (1976).

[773] NGOs and activists at the helm of this venture have capitalized upon the diminished role of the state in the post-Cold War era and seized control over the prescription and enforcement of IHL from states—the entities that actually engage in armed conflict. In so doing, they have extended it beyond its functional and democratic limitations:

> For the past 20 years, the center of gravity in establishing, interpreting and shaping the law of war has gradually shifted away from the military establishments of leading states . . . and from the International Red Cross . . . and toward more activist and publicly aggressive N.G.O.'s . . . [T]he pendulum shift toward them has gone further than is useful, and the ownership of the laws of war needs to give much greater weight to state practices of leading countries.

Kenneth Anderson, *Who Owns the Rules of War?*, Crimes of War Project, *available at* http://www.crimesofwar.org/special/Iraq/news_imag6.html (last visited June 8, 2004).

"Ownership" of IHL is crucial. Inarguably, substantive IHL scholarship is augmented by knowledge of military history and combat experience: those unenriched by either are subject to criticism particularly where they advocate prescriptions that history and experience have proven untenable in actual combat. *See* H. Wayne Elliot, *History, War, and Law* (1994), 30 TEX. INT'L L.J. 631, 637 (1995) (reviewing THE LAWS OF WAR (Michael Howard et al. eds., 1994)) ("Only when one has a firm foundation in military history can one truly begin to understand the utility and respect and criminalize its violation only to the extent that it comports with the practical necessities of honorable soldiers locked in total war[774] against barbarians who brook no legal restraints whatsoever. In other words, by rationalizing IHL[775] the West can interdict evil and shepherd law, along with the civilization law defends and reflects, through the vale of terrorism.[776] The next section operationalizes this thesis by reinventing IHL as a regime that humanizes conflicts between soldiers who observe the martial code yet banishes barbarians to a legal wasteland beyond its application.[777]

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limits of [IHL].”). Many critics of the United States position on the ICC are civilians lacking an understanding of the stochastic, nonrational processes that govern combat and exert pressures to derogate from absolutist, positivist legal proscriptions and prescriptions. *See* FUSSELL, *supra* note 213, at 283 (“The relative few who actually fought know that the war was not a matter of rational calculation. They know madness when they see it.”) As a consequence, these critics are unable to appreciate the environment in which soldiers make decisions, and thus when they recapitulate the events in question to determine what they would do under similar circumstances and to adjudicate individual criminal responsibility, they are bereft of the most essential information. IHL conceived in ignorance thus carries within it the seeds of its own compliance failures and ultimately its unenforceability.

[774] Although there has not been a formal declaration of war, “only a most technical and arid legalism could deny that [the United States is at war with terrorist organizations].” Reisman, *supra* note 82, at 88 n.14.

[775] *See* THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 30 (Hersch Lauterpacht, ed., 1959) (“[W]henever men become sufficiently dissatisfied with the existing regime of positive law and custom, they will be found reaching out beyond it for the rational basis of what they conceive [it] ought to be.”).

[776] The term “rationalize” has traditionally been employed with respect to the scholarly review of IHL for the purpose of suggesting those modifications that harmonize the “rules on the books” with the prescriptions and proscriptions likely to be observed by soldiers in practice. *See, e.g.,* FOOKS, *supra* note 143, at 3 (calling for the modification of IHL such that “the rights of belligerents [are] secured by such agreements as are likely to be followed in time of war”); HINGORANI, *supra* note 14, at 194-95 (concurring with the argument that the acceptance and observance of IHL depends upon its compatibility with the realities of warfare and stating that “[n]o belligerent will accept the rules of [IHL] which run counter to its basic principles and interests”).

[777] Although this distinction intersects at the level of theory with the lawful-unlawful combatants distinction by asserting that the allocation of legal rights should reflect the degree to which belligerents assent to and comport themselves in accordance with the rule of law, the two are of different provenance, and the former is intended as a guide less in regard to the resolution of legal issues surrounding detention and prosecution of enemy belligerents for pre-capture crimes than to the choice of legal standards and institutions connected with the

D. Operationalizing the Barbarian Distinction

States, as well as individuals, have the moral and legal right, independent of any institutional arrangements, conventional understandings, or subjective beliefs, to defend themselves against terrorism. Principles of fundamental fairness and justice militate in favor not only of restoring the pre-1977 legal consequences of terrorists' unlawful combatancy but of internalizing, rather than transferring to their opponents, the legal consequences of their depredations against civilized peoples. If IHL is to continue to merit compliance by state-defenders of the international community, then, in the existential battle against terrorists who declare civilization itself as the stakes for which the war is to be contested, the margin of appreciation to which the United States and allied states[778] are generally entitled in interpreting the boundaries of IHL should be stretched to its zenith, not contracted to its nadir. Ultimate victory over terrorism will, on occasion, require states to undertake missions that give rise to claims that members of their armed forces have violated provisions of IHL that do not universally meet the definition of binding law; in other cases, otherwise valorous warriors pressed to their physical and emotional limits may deny quarter or inflict reprisals that, while inarguably violative of positive law, are excusable or at least mitigated in their seriousness in light of all the circumstances,

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adjudication of alleged violations of IHL by soldiers.

[778] Unilateralism, generally a more politically costly approach to international relations than a more multilateral foreign policy, "sits uncomfortably" with those who fear that a single "state has taken on the role of judge, jury and policeman." Wedgwood, *supra* note 495, at 726. Ideally, the United States will gain the support of a coalition of like-minded states who together will demand and obtain a wider margin of legal tolerance for their concerted actions in response to terrorism. However, if a multilateral approach fails, or if multilateral policy agreement does not translate into assistance in military operations or in providing legal support to U.S.-led operations, the United States may be forced to take the path to a rationalized IHL alone. *See id.* at 727 (conceding that the "availability of unilateral action may be essential to forging a result that strengthens security"). For a discussion of the difficulty in securing and maintaining alliances in international relations, *see generally* James A. Caporaso, *International Relations Theory and Multilateralism: The Search for Foundations*, 46 INT'L ORG. 599 (1992).

especially the fact that it is terrorists who are the "victims." The ratio of the evil that soldiers may occasion in the defeat of terrorism to the evil that they avert by hastening its demise is sufficiently favorable that any rational theory of IHL will ensure that institutions called upon to adjudicate criminal responsibility consider the net benefit with which their labors have endowed mankind in balancing the scales of justice. In short, the transposition of IHL in light of the contemporary threat directly implicates the ideological interests and perspectives of the actors and institutions that interpret and adjudge the conduct of soldiers, and rather than permit the ICC, a politicized body disinterested in the moral universe of soldiers and committed to an absolutist philosophy that excludes exigency, necessity, and justice from its calculus, to pass judgment in regard to alleged violations of IHL in the war on terror, United States and allied soldiers should be held to the ethical and moral strictures of the martial code.

However, courts-martial will justifiably rely upon the judgment and experience of members of the martial profession in applying nonlegal norms, interpreting ROEs, and ultimately determining whether the conduct of an accused can fairly be said to have been contrary to that expected of the honorable soldier, a standard radically different from legal absolutism. A rationalized approach to IHL takes a much more conscientious approach to upholding civilizational obligations and demands that parallel institutions respect the determinations of courts-martial. Certainly, not all transgressions across the burgeoning boundaries of what the human rights NGOs championing the ICC declare to be IHL can legitimately be characterized as war crimes or crimes against humanity. Viewed through the analytical prism of a rationalized IHL, as courts-martial have been wont to do across their developmental history, it is impossible to describe the acts of Private Ryan et al. or the personnel associated with Task Force Ryan as barbaric, and it is utterly beyond comprehension that the conduct of those prosecuting the agendae of Nazism and Islamic terrorism—irrefutably barbaric programs[779]—could ever be perceived as more deserving of legal shelter than the soldiers who interpose between them and civilization. It is worse than foolish to pretend that the militaries of Western democracies defending against Nazism and Islamic terrorism spawn war criminals at the rate or on the order of their wicked foes. To forfeit moral judgment guts IHL of its normative component and mocks justice.

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[779] *See* AIME CESAIRE, DISCOURSE ON COLONIALISM 36 (Joan Pinkham

This is not to suggest that courts-martial need validate the greatest fears of legal absolutists, who distrust the professional self-regulation of the armed forces and envision courts-martial as a forum suited principally to whitewashing military misdeeds. Although the temptation to abandon all normative and legal restraint may be great,[780] rationalization need neither imply nor countenance the general suspension of IHL in the fight contra barbarum. Even while engaged in this just cause, moral and legal responsibility attach to all individuals—civilian or military—charged with the prosecution of the war on terror. In armed conflicts, however characterized, the United States, one of the few states that has systematically prosecuted violations of IHL, must continue its official policy of scrupulous

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trans.,1972) (1955) (offering an early academic treatment of Nazism as "the crowning barbarism that sums up all the daily barbarisms).

[780] Terrorists are the sort of "implacable enemy whose avowed objectives"—the destruction of our way of life—motivate maximalist responses and the abandonment of "[h]itherto acceptable norms of human conduct" as the price of their defeat. DOOLITTLE COMMITTEE, REPORT ON THE COVERT ACTIVITIES OF THE CENTRAL INTELLIGENCE AGENCY (Sept. 30, 1954). A reknowned United States constitutional scholar has advocated the judicially-sanctioned torture of terrorists to force the disclosure of information that would prevent an imminent and massive terrorist attack. *See* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 166-213 (2002). Another scholar suggests that the United States go so far as to consider the destruction of Islamic holy sites in order to simultaneously constitute the conditions for future deterrence and to disprove the mistaken notion held by some terrorists that Western decadence renders Western restraint inevitable. *See* Daniel Pipes, Discarding War's Rules, N.Y. POST (Online Edition), July 22, 2003, available at http://www.nypost.com/postopinion/opedcolumnists/1200.htm (previewing a forthcoming work by Lee Harris that claims it is Western restraint, the product of an "arch-civilization," that has "insulated its enemies from the deserved consequences of their actions."). Although the present argument is in some senses a call for a break with past restraints, it does not accept that the intentional targeting of civilian structures is permissible within the ethical boundaries established by the martial code.

adherence to those aspects of the IHL canon that can be harmonized with the ethos and principles of the martial code and the practical necessities of the war on terror, and it should strive always to conduct its operations so as to afford the greatest humanitarian protections to all privileged persons. Moreover, the martial code does not necessarily disfavor the grant of humanitarian treatment, where feasible, to terrorists,[781] in part because law is so deeply impressed into the fabric of our civilization that it is difficult to forswear it even in response to terrorism,[782] and in part out of homage to chivalric ideals.

Nonetheless, a rationalized IHL is inimical to the absolutist argument that the legal standard to which soldiers combating barbarism should be held is exempt from recalibration to reflect the nature of, and threat posed, by these anti-civilizational adversaries. It is worse than foolish to pretend that the militaries of Western states defending against Nazism and Islamic terrorism spawn war criminals or criminals against humanity at the rate of their foes; rather, it is a dangerous, often politically-motivated position which finds expression in the exposition of legal absolutist arguments that, actualized through the jurisprudence of the ICC, may threaten the edifice of law and the civilization which depends upon it. In stark contrast, the martial code, with its broad consideration of not merely legal but also non-legal variables[783] in ascertaining whether an accused has abided by the precepts that direct the conduct of honorable member of the military profession, embraces the positions that legal and moral obligations under IHL are, to some extent, conditional, and that the degree to which an enemy force observes IHL, the means and methods employed by an enemy, and the justice of the cause for which an enemy fights are relevant variables in the decisional matrix employed by those called upon to judge martial conduct. In other words, a sliding legal-moral scale is at work within the legal machinery of a rationalized IHL regime that weighs the experience of the combat soldier and the moral virtues and vices of combatants without abandoning its humanizing mission. This scale would permit a far more nuanced and holistic examination of alleged violations of IHL. Although it would unhesitatingly adjudge the deliberate murder of an innocent civilian or otherwise blameless POW serving an enemy force that accords treatment consistent with the martial code to be ipso facto an act of barbarism, it would declare reprisal against a parole violator or terrorist as either a justifiable offense or a much less serious crime punishable with disciplinary sanctions, and not simply declare the act a war crime justifying imprisonment. Moreover, it would reflexively reject any assertion of criminality with respect to the unintentional killing of civilians located near terrorist targets. In effect, a rationalized IHL is an admixture of *jus in bello* and *jus ad bellum* that treats not merely the conduct of soldiers *but also the cause for which they fight* as practically significant in establishing differential legal standards, canons of interpretation and guidelines for adjudication. Thus, the following measures are proposed to effect the formal operationalization of the civilized peoples/barbarians distinction in a rationalized IHL regime:

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[781] Terrorists might be offered, as an act of grace rather than legal obligation, the protections of IHL, and the privileges inherent in the judicial model. *See* 10 U.S.C. § 818 (1998) (permitting courts-martial jurisdiction to try "any person who by the law of war is subject to trial by a military tribunal."); 18 U.S.C. § 3231 (2000) (grating jurisdiction to federal district courts to try all offenses against the laws of the United States).

[782] This is not to suggest that soldiers in circumstances such as those faced by T/5 Upham will never undertake reprisals in response to terrorists' violations of IHL. However, for soldiers in the armed forces of the West, impressed as they are at all turns with the requirements of the martial code as well as with the obligations, as members of a civilization governed and symbolized by the rule of law, there are significant professional and cultural restraints upon the abandonment of rule-governed behavior. *See* BARNETT, *supra* note 96, at 16 (examining cultural differences with regard to willingness to violate law in pursuit of personal and social objectives and to undertake reprisals for others' violations of the law).

[783] The application of non-legal norms to the humanization of war fits into a generalized discussion of the salience of non-legal norms in regulating the conduct

1. The U.S., acting under the protective principle of jurisdiction,[784] should exercise its sovereign right to prescribe legis-

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of epistemic communities. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991).

[784] The protective principle of jurisdiction permits domestic exercise of jurisdiction where an extraterritorial act threatens interests vital to the security, territorial integrity or political independence of the prosecuting state and allows the state to prosecute foreign nationals. *See* RESTATEMENT (THIRD) OF THE FOREIGN

lation designating particular states, groups (including but not limited to those listed as foreign terrorist organizations by the State Department)[785] and individuals,[786] regardless of nationality, as barbarians and declaring them, by virtue of their predations against civilians, "criminals against civilization" who disentitle themselves from the panoply of legal rights and privileges under international and domestic law.[787] The

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RELATIONS OF THE UNITED STATES § 402 cmt. f (1987). This jurisdictional basis has been used to prosecute terrorists under United States law for conspiracy to engage in attacks that affected or would affect United States nationals. *See* United States v. Yousef, 327 F.3d 56, 108-11 (2d Cir. 2003) (affirming application of CIL principle of protective jurisdiction to uphold convictions of terrorist defendants for conspiring outside the U.S. to destroy civilian airliners upon which United States nationals were to have been on board, in violation of 18 U.S.C. § 32)

[785] *See* U.S. Dep't of State, Office of the Coordinator on Counterterrorism, Appendix B: Background Information on Foreign Terrorist Groups, at I (Apr. 30, 2001) (listing twenty-eight officially designated foreign terrorist organizations), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2000/2450.htm (authorized by Antiterrorism and Effective Death Penalty Act of 1996).

[786] *See* Eric Lichtblau, *Wanted: A Short List of 100,000 Terrorists*, N.Y. TIMES, Sept. 21, 2003, § 4, at 5 (reporting that the United States is compiling a "master list" of over 100,000 known and suspected terrorists for use in law enforcement and military defense).

[787] The designation of a "crime against civilization" could be envisaged as a meta-war crime or as a distinct category of criminality. Although domestic definitions of war crimes generally overlap with the definitions established under IHL, the principle of sovereignty permits states to adopt their own domestic standards provided the resulting legislation does not run counter to norms of jus cogens. *See* Joyner, *supra* note 21, at 165 (discussing sources of conflict between domestic and international law with regard to war crimes definitions); *see also supra* note 701 (discussing norms of jus cogens). In an attempt to restore a measure of symmetry to the battlefield, states might elect to redefine war crimes to prohibit the tactics, weapons or other practices of their adversaries as well as to threaten enemy combatants with punishment for the employment of these tactics, weapons or practices upon capture. Taken to further extreme, a state might elect to immunize the use, by its soldiers, of all tactics, weapons, and practices, even those otherwise prohibited by law. The declaration proposed herein would effectively stand as a declaration of war against terrorists that would not only transform legal relations between the United States and terrorist groups but would open up, for use against identified terrorists, a set of military options, tactics, and weapons otherwise prohibited by domestic and international law. Constitutional amendment may be necessary to pass such legislation, as the doctrine of outlawry has long lapsed into obsolescence under the domestic law of States and was never available at federal law, and the 5th Amendment Due Process Clause has been interpreted in dissent by the Supreme Court as an impediment to the resurrection of outlawry. *See* Ullmann v. United States, 350 U.S. 422, 452 n.5 (1956) (Douglas &

Actus Contra Barbarum (Act Against Barbarians) [hereinafter ACB] will relegate such actors to an inferior status under IHL—in effect, it will redefine them as unprivileged, rightless outlaws—as IHL is incorporated in U.S. law.[788] This declaration need not be interpreted as a denunciation of the general applicability of IHL provisions with which the U.S. disagrees; rather, it would publicly proclaim that the U.S. will withhold the protections of IHL from rogue states and terrorists and exercise restraint in its operations against them only indirectly through observation of humanitarian obligations safeguarding civilians and other noncombatants.[789] Terror-

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Black, J.J. dissenting) ("[T]he prohibition of Bills of Attainder place[s] beyond the pale the imposition of . . . outlawry by either the Executive or the Congress.").

[788] Although the unlawful combatant distinction effectively imposes this legal status by executive order upon terrorists captured in battle, congressional silence leaves the door open to arguments that the civil rights of unlawful combatant detainees, particularly those who possess United States citizenship, have been violated by their detention without the procedural and substantive benefits of the Geneva Conventions. *See* Padilla *ex rel* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003) (challenging detention of United States citizen, suspected of membership in al Qaeda, held by military on a material witness warrant as an unlawful combatant without access to counsel); *see also supra* notes 624-702 (discussing the effects of the Protocols Additional on the customary doctrine of unprivileged belligerency). Moreover, the proposed declaration encompasses all members of designated terrorist groups within its ambit even in advance of armed conflict with those groups rather than applying simply to those members caught not in compliance with the conditions necessary to establish lawful combatancy. *Padilla ex rel Newman*, 243 F. Supp. 2d at 43. As such, ACB is an act of legal preemption designed to affirmatively resolve not only the constitutional authority to detain unlawful combatants indefinitely but to discriminate, even in contravention of IHL, as between different categories of combatants on the basis of the objectives and methods of their armed operations. In conjunction with existing legislation permitting divestiture of nationality from United States citizens, ACB should meet no constitutional impediments to its application against terrorists of any nationality. *See* 8 U.S.C. § 1481 (2003) (providing for loss of citizenship by United States national who (1) makes formal declaration of allegiance to or serves in armed forces or government of a foreign power, (2) commits treason or (3) attempts the violent overthrow of the U.S.).

[789] One commentator proposes the far narrower solution of eliminating the principle of proportionality with respect to anti-terrorist operations. *See* Michael C. Bonafede, Note, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11th Attacks*, 88 CORNELL L. REV. 155, 189-97 (2002). This Article proposes a much broader suspension of IHL in regard to the War on Terror that is indebted to the ancient Romans, who incorporated contingency clauses in statutes to provide that positive law could not abrogate what was considered sacrosanct or natu-

ists and rogue states would then be subject to attack by all means and methods at all places and times, denied quarter, and subjected to summary execution. In short, ACB would declare bellum americanum[790] against terrorists. To secure domestic political support, and in light of strategic considerations, the ACB might contain a provision suspending its legal effect for a period of months to induce affected states and groups to desist from terrorism and comply with IHL; failure to do so would result in immediate abandonment of all restraint.[791] The legislation might incorporate a provision granting affected parties standing to appeal inclusion on the list and permitting special appearances,[792] along with safe passage,[793] for this purpose.[794] In the alternative, or in con-

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rally just. *See* A.P. D' ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 29-31 (1951) (discussing procedure whereby Roman *lex scripta* could be negated by reference to principles of natural law). Effectively, the *Actus Contra Barbarum* is an assertion that natural legal principles, grounded in a universal understanding that terrorists are enemies of all mankind and beyond the reach of law, permit and even necessitate the bifurcation of IHL the better to defend law and civilization.

[790] *See* Hurst Hannum, *Bellum Americanum*, 27 FLETCHER F. WORLD AFF. 29, 29 (2003) (describing War on Terror avowedly designed to "accomplish 'good' through war" as "*bellum americanum*"). *Bellum americanum* is thus *bellum romanum* adapted to current usage. *See supra* note 679 (describing *bellum romanum* as unrestrained war against barbarians).

[791] Social science research suggests that the most efficient strategy for inducing cooperation is one that initiates relations on a cooperative basis but immediately retaliates in response to "defections" with punitive actions. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 174-76 (1984) (describing "TIT FOR TAT" as the most effective strategy in securing cooperation, suppressing defection and teaching opponents to understand that noncooperation is unprofitable). The proposed strategy, however, requires that subjects make rational calculations, an assumption potentially false in the case of terrorists. *Id.* at 174. Moreover, observation of the martial code and terrorism are, logically speaking, mutually exclusive; honorable soldiers simply do not target civilians, and *jihadis* are programmed to the destruction, not accommodation, of unbelievers. For arguments that Islamic warriors are incapable of assimilating the martial code, *see* Bassam Tibi, *War and Peace in Islam*, *in* THE ETHICS OF WAR AND PEACE 128, 128-45 (Terry Nardin ed., 1996); IGNATIEFF, *supra* note 119, at 147. For an argument that the regime elites that sponsor terror, as well as leaders of terrorists groups, can be deterred, *see* Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT'L L. 121, 139-40 (2003).

[792] *See* FED. R. CIV. P. 12(b)(2).

[793] Terrorists might be given temporary status as protected diplomatic persons to enable their safe passage to and from the United States to plead their legal cases. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500

junction, the legislation might authorize the President to negotiate bilateral agreements, akin to treaties,[795] with states and terrorist groups in which the U.S. would pledge to refrain from implementing ACB in respect to those actors that pledge to follow IHL, refrain from military operations against the U.S. and its nationals and divest themselves of all but those weapons systems required for self-defense.[796]

U.N.T.S. 95, art. 29 (providing that the "person of a diplomatic agent shall be inviolable," that he shall be immune "any form of arrest or detention," and that the "receiving State shall . . . take all appropriate steps to prevent any attack on his person, freedom or dignity.").

[794] This provision would explicitly overrule caselaw. *See*, e.g., People's Mojahedin Organization of Iran v. Albright, 182 F.3d 17 (D.C. Cir. 1999) (dismissing as nonjusticiable political question a suit by members of foreign organizations appealing their designation as terrorist groups by the Secretary of State).

[795] Technically, compacts between state and non-state actors are not considered "treaties" under international law. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(a), 1155 U.N.T.S. 331, 333 (stating that a treaty is always an international agreement "concluded between States."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311 (1987) (restricting treaty membership to states). Nevertheless, under international law terrorist organizations are not *per se* ineligible from entering into *agreements*, as distinct from *treaties*, with states. *See* 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 494-95 (H. Lauterpacht ed., 6th ed. 1947) (supporting treaty-based agreements between states and insurgent organizations); BROWNLIE, *supra* note 597, at 65-66 (same).

[796] The United States has negotiated treaties with states with which it continues thereafter in a state of war, including some that would currently be characterized as rogue states. *See, e.g.,* Treaty of Peace and Amity between the United States and Tripoli, concluded June 4, 1805, article XVI *cited in* 2 WILLIAM M. MALLOY, TREATIES AND CONVENTIONS, INTERNATIONAL ACTS, PROTOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, 1776-1909 (1910) (agreeing on principles restricting conduct of war between United States and Barbary States and providing that POWs would not be enslaved but rather exchanged within 1 year). On April 15, 2003, the United States concluded its first ever *accord* with a terrorist organization, permitting the Mujahedeen al Khalq, a 10,000 member anti-Iranian group placed on the State Department list of terrorist organizations in 1997 for attacks against Iranian government targets, to keep most of its weaponry and to be immune from United States military operations in exchange for agreeing not to undertake hostile acts against the United States and to provide intelligence on Iran. Douglas Jehl & Michael R. Gordon, *American Forces and Terror Group Reach Cease-Fire*, N.Y. TIMES, Apr. 29, 2003, at A1. Israel reached a similar agreement with Hizballah in 1996 that enjoyed some success. *See* Adir Waldman, *Clashing Behavior, Converging Interests: A Legal Convention Regulating a Military Conflict,* 27 YALE J. INT'L L. 249, 250 (2002) (describing IDF-Hesbollah "April Agreement" governing combat in South Lebanon and committing parties to limitations on methods and means and to protection of

2. To translate this strategic declaration into rules of decision for courts-martial, Congress could, as a provision in ACB, amend the UCMJ to expressly establish the doctrine contra barbarum ("against terrorists") as an absolute defense that absolves soldiers of responsibility who are accused of UCMJ violations while combating terrorism.[797] Alternatively, the Manual for Courts-Martial could be amended to provide that the fact that a soldier is alleged to have committed the specified crime in question contra barbarum is a factor in mitigation of the severity of the offense as well as of applicable sanctions upon conviction.[798]
3. The President should not submit future IHL treaties for ratification without first negotiating a contra barbarum clause waiving the legal effect of these instruments with respect to terrorists. The Senate might append an understanding or declaration to such texts indicating that the U.S. position is that terrorists are not within the protections afforded by such treaties.
4. If the ICC amends Article 120,[799] the President might revisit the question of accession to the Rome Statute. Conditions precedent should, however, at a minimum include the following: (a) a contra barbarum clause in the instrument of ratification reflecting the understanding of the Senate that the Rome Statute is inapplicable in armed conflict with terrorists;[800] (b) a statement to the effect that the U.S. does not

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noncombatants). Whether similar such agreements can be crafted to bind organizations such as al Qaeda is uncertain. *See* Howard Witt, *Iranian Group on Terrorist List Has Pull in D.C.*, CHI. TRIB., Jul 13, 2003, at A4 (suggesting that agreement with the Mujahedeen Khalq was possible only because Congress considers it a "pro-Western" organization); ELSHTAIN, *supra* note 663, at 154 (valuing a treaty negotiated with a terrorist group as "not . . . worth the paper it was written on.").

[797] *See supra* notes 135, 342, 452 (enumerating applicable defenses in United States courts-martial)

[798] *See supra* notes 135, 342 (considering mitigating and extenuating circumstances in trial and sentencing in courts-martial).

[799] Presently, the ICC does not permit reservations. Rome Statute, *supra* note 32, art. 120. Nor may amendments be made prior to 2009, and even then a supermajority of 7/8 of States Parties will be required. *Id.* art. 121(1), (4).

[800] This precondition would possibly require amendment to the Rome Statute, which, under Article 21, rejects "application and interpretation of law . . . with[] . . . adverse distinction founded on grounds such as [inter alia] religion or belief, [or] political or other opinion." Because the doctrine of contra barbarum would alter the interpretation or application of law with respect to terrorist on

recognize any conventional instruments to which it is not a party, or any statements of custom to which it has persistently objected,[801] as creating any legal obligations; and (c) a statement to the effect that the U.S. understands that the ICC Prosecutor will in, all cases, recognize that a U.S decision not to investigate or prosecute a U.S. national, or to sentence a U.S. national upon conviction at court-martial to a particular penalty, will have been made in good-faith and consistent with the interests of justice and that the Prosecutor, in deference to complementarity, will not invoke ICC jurisdiction. The U.S. might pursue the conclusion of a treaty to this effect, thereby securing a grant of functional immunity.[802]

5. If the ICC will not amend Article 120, the U.S. should suspend all financial aid to and terminate trade relationships with states that refuse to sign bilateral treaties pledging not to extradite U.S. nationals to the ICC.[803] The U.S. should withdraw all forces from the territory of states-parties and notify the U.N. that it will refuse to provide troops to peacekeeping operations upon their territory. An amendment to

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account of the acts they undertake in furtherance of their religiously-motivated political program, the Rome Statute would, as currently conceived, be perceived as a bar to such a reservation or understanding offered by the United States upon its accession.

[801] The "persistent objector" rule of CIL provides that a state is not bound by the maturation of a CIL principle if it has consistently indicated its dissent from a practice while the law was "still in the process of development." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. d (1987). The United States has at very least an arguable claim that it has persistently objected to many declarations of customary IHL, although its failure to specify precisely what obligations it does recognize, coupled with its adherence to many principles in the Protocols Additional and other IHL declarations out of humanitarian concerns if not a sense of opinio juris, complicates this claim. *See supra* notes 404, 608, 609 (noting United States refusal to specify which provisions of IHL it recognizes as legally obligatory and describing United States practice as consistent with much of Protocols Additional). For a discussion of the "persistent dissenter" rule of CIL, see Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 459-60 (1985).

[802] *See* Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 103 (2003) (arguing that the price of enforcement of ICC decisions should be the grant of "functional immunity" to the U.S.).

[803] *See supra* note 58 (discussing recent proliferation of such treaties between the United States and over 35 states).

> ASPA bolstering the Hague Invasion Clause[804] might grant explicit notice that the transfer of a U.S. national to the ICC would create a state of war between the transferring state and the U.S.[805]
> 6. The U.S. should encourage all states to adopt similar classificatory mechanisms reflective of the civilized peoples/barbarian distinction to facilitate a coordinated bellum americanum against terror.[806]

Chart I presents three variant images of the relationship between law and war: the first depicts the legal absolutist view, in which war is wholly subsumed by and regulated by law; the second illustrates the nihilist position, in which law is irrelevant to war; and the third represents a rationalized IHL in which operations against honorable foes occur in the zone of intersection and are governed by the martial code, but operations against terrorists are conducted in the peripheral space contra barbarum where law does not reach war.[807] In this third image, invocation of ACB directs soldiers to march across the line delineating the zone of intersection from the zone contra barbarum into total war against barbarians; by the same token, in the third image the border is permeable bidirectionally. Barbarians are invited to embrace the martial code, cease attacking civilians and engage soldiers in the zone of intersection.

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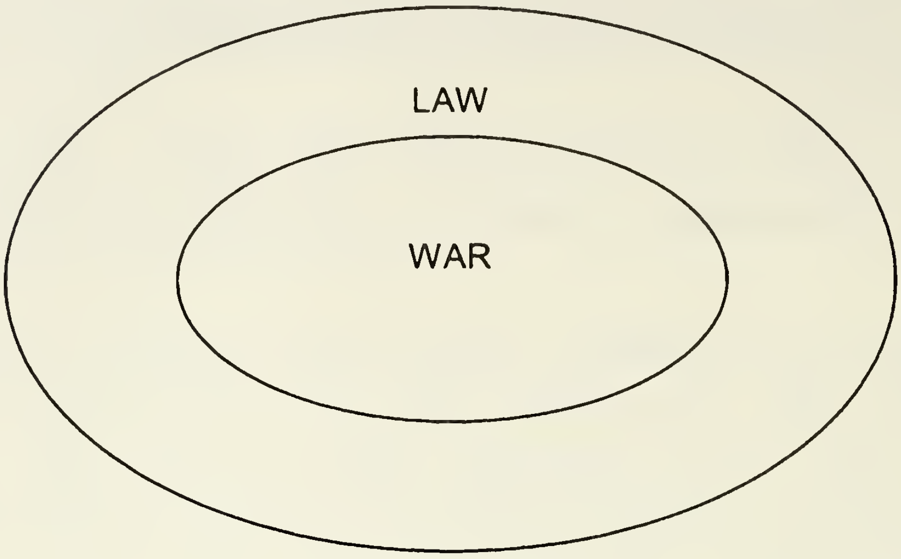
[804] *See supra* note 62 and accompanying text.

[805] *See supra* note 788 (offering proposed language to effect such a declaration of war under these circumstances).

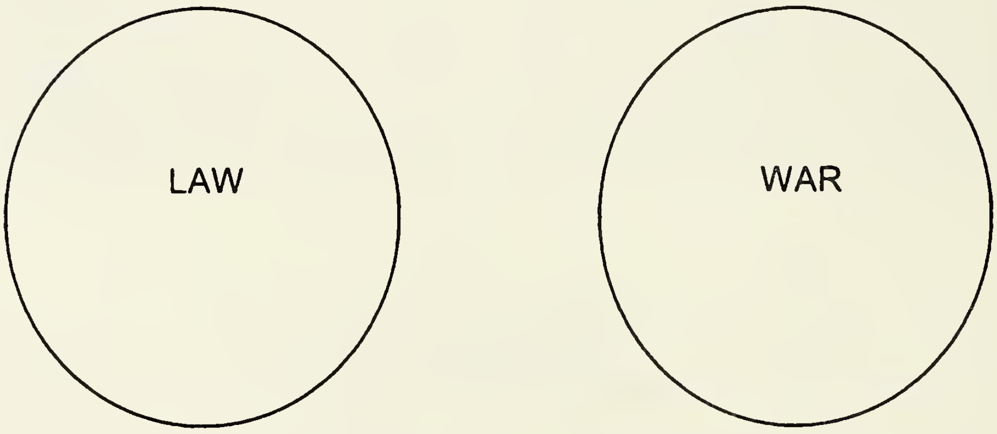
[806] Currently, there is disagreement within the Western Alliance as to precisely which organizations merit classification as "terrorists." *See* Marc Perelman, *EU Won't Ban Hamas* (July 16, 2003), *available at* http://www.frontpagemag.com/articles/ReadArticle.asp?ID=8937 (reporting that the EU executive organ, the European Commission, despite significant United States pressure, has declined to classify the "political wing" of Hamas a Middle East terrorist organization, although the EU considers its "military wing" to be so). Disagreements over precisely "who is a terrorist?" threaten to impede collective action in the War on Terror. However, Israel, by declaring "all-out war" against Hamas, appears to have adopted the very *bellum romanum* approach proposed. *See* Matthew Chance, *Israel Vows "All-Out War" on Hamas* (CNN television broadcast, Sept. 2, 2003) *at* http://www.cnn.com/2003/WORLD/meast/09/01/mideast/ index.html.

[807] The depiction of these images builds upon a recent critical analysis of the theories of legal absolutism, also known as classic legalism, and legal peripheralism, a perspective into which a rationalized IHL fits neatly, in which non-legal norms and rules are often more important in the regulation of human behavior than is positive law. *See* Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 254-59 (2003).

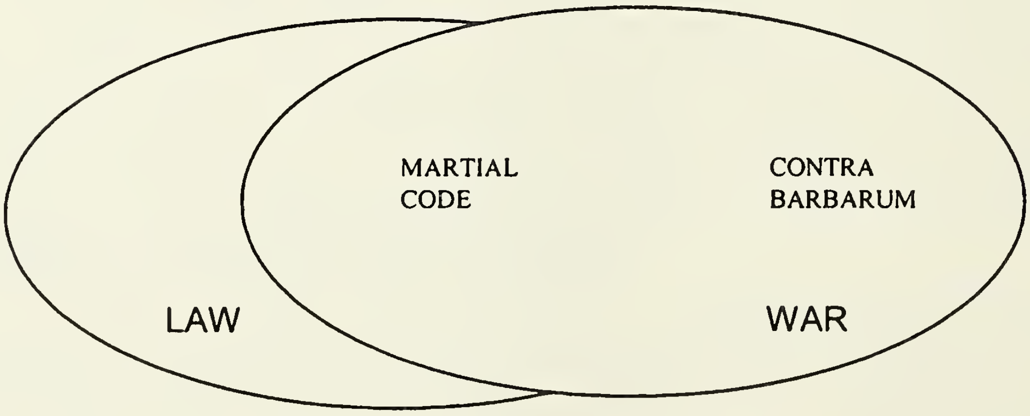
CHART I: THREE IMAGES OF THE RELATIONSHIP BETWEEN LAW AND WAR



I. IHL ABSOLUTISM



I I. IHL NIHILISM/BARBARISM


MARTIAL CODE
CONTRA BARBARUM
LAW
WAR

III. IHL RATIONALISM

In sum, a rationalized IHL, given effect through the system of courts-martial but with the door open to parallel association with a reformed and delimited ICC, is the image best suited to humanizing war without neglecting civilizational obligations because it attaches practical legal consequences to the gross moral distinction between honorable soldiers and barbarians.

IV. CONCLUSIONS

The proposal for a rationalized IHL is the first major theoretical revision of the laws of war in decades, perhaps even a half-century,[808] and change is invariably received by some as threatening. Legal absolutists, in their cupidity for a law-ruled world, may read into the call for a rationalized IHL an entreaty to the destruction of their avatar,[809] as well as to the general weakening of international law.[810] Some may attack as illiberal, imperialist,[811] Islamophobic or even racist[812] the argument that only the process of differentiation between combatants based upon the justice of the causes for which they fight

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[808] Although Anne-Marie Slaughter has proposed that Article 2(4) of the U.N. Charter be amended to dispense with a primary pillar of the *jus ad bellum*—the principle of the inapplicability of the use of force against the territorial integrity or political independence of states—and strengthen the *jus in bello* principle of civilian inviolability, she offers no concrete proposals to achieve this end, nor does she attempt any fundamental reorganization of the field. *See* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 2 (2002) (proposing only that Article 2(4) of the U.N. Charter be amended to read as follows: "All states and individuals shall refrain from the deliberate targeting or killing of civilians in armed conflict of any kind, for any purpose."). *See* Mary Ellen O'Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 446 (2003) (reviewing CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000)) (stating that the extant IHL regime has been essentially unmodified for nearly six decades by a majority of states that continue to insist on strict adherence to its rules).

[809] *See* Adam Roberts, *The Laws of War in the War on Terror*, INT'L L. STUD. (forthcoming 2003) (manuscript on file with author) (anticipating suggestions for the modification of IHL will be perceived by absolutists as programs for the destruction of IHL). Some observers, willing to concede the propriety of modification to IHL, nonetheless insist that any modifications be "reasonable," "taken as much as possible on a collective basis," and consistent with the "generally accepted principles in [the] international community." *See* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 1001 (2001). Whether this is a genuine call for a multilateral approach to transforming IHL or merely a sophisticated restatement of IHL absolutism remains to be determined. Other scholars suggest the former position is gaining adherents. *See* Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.* , N.Y. TIMES, Mar. 18, 2003, at A33 (describing the United States War on Terror as "illegal but legitimate" in light of moral considerations (referencing Independent Commission on Kosovo, The Kosovo Report: Conflict, International

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Response, Lessons Learned 4 (2000)). Yet others remain staunchly opposed to transforming IHL and maintain that departure from the judicial model in the War on Terror, even more than terrorism itself, represents the "major threat to the future of the international system." Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 384.

[810] *See* STRAWSON, *supra* note 764, at xix (stating as of 2002 that "[i]n challenging so much in the international legal order [to conduct the War on Terror], President Bush may inadvertently have broken the spell of modern law" inasmuch as "[w]hat had appeared so fixed has now been consciously transformed into a contested arena"). The claim that international law is a fragile body of regulation that relies heavily for its existence upon its near-mythic status as a kind of received truth in the minds of state decisionmakers, that it is never acceptable to violate law even in defense of a moral imperative, and that the fate of international law generally hinges on the preservation and expansion of IHL are central features of legal absolutist dogma.

[811] *See* ANDREW J. BACEVICH, AMERICAN EMPIRE (2002) (claiming that the United States is becoming an imperial power through the globalizing influence of United States law and power). The civilization/barbarian distinction, once a predominant organizing principle in *fin de siecle* international relations theory, has been challenged by realists displeased that Western states should pursue a civilizing mission rather than the maximization of power, as well as by dependency and critical scholars who critique an imperalist justification for domination of "backward peoples" to secure an advantage in global trade. *See* WILLIAM C. OLSON & A.J.R. GROOM, INTERNATIONAL RELATIONS THEN AND NOW 146 (1991). For the most plangent critique of the resurrection of the civilization/barbarian distinction, see SALTER, *supra* note 668 (noting that classifications of peoples as morally culturally and racially inferior justified abandonment of legal restraint to aid their domination and extermination).

[812] Admittedly, 19th and 20th century Western powers warped the civilization-barbarian distinction to justify colonialist and genocidal policies. *See* HEINRICH VON TREITSCHKE, ZEHN JAHRE DEUTSCHER KAMPFE (Berlin, George Reimer 1897) (justifying extermination of "barbaric" colonial populations on the ground that such peoples were deemed biologically inferior); JOHN FISKE, THE BEGINNINGS OF NEW ENGLAND (New York, Houghton, Mifflin & Co. 1889) (justifying slaughter of American Indians on the ground that "civilized peoples" were entitled to use any means and methods to defend against "savages"); AMERICAN IMPERIALISM 95 (Henry Graff ed., 1996) ("When a war is conducted by a superior race against those whom they consider inferior . . . the superior race will almost involuntarily practice inhuman conduct."). Some contemporary scholars fear that the trope of the terrorist as "frightening, foreign, barbaric beast" is a racialized illusion to support the claim that "ordinary law is . . . deficient or insufficient to deal with them" and "extra-ordinary law," which will remain on the books long after the threat has passed, is required. Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 121-22.

and the degree to which they observe IHL can defend civilization.[813] Others, disinclined to inject moral considerations into law, unwilling to agree upon an epistemology that enables us to discern what is right and wrong[814] and uncomfortable with revivification of the language of good and evil,[815] or unalterably distrustful of the moral fibre of soldiers, may cavil at the re-introduction of jus ad bellum considerations, particularly if members of the martial profession sit in judgment not only of their peers but of the causes for which their enemies take up arms. Further, the argument that any class of persons, no matter how reprehensible, can ever be stricken from the set of rights-bearing entities may offend those for whom natural law dictates that all individuals possess, by the bare fact of their existence, an inviolable body of rights: for these critics, the proposed rationalization may seem a nihilistic Conradian plea to "Exterminate all the brutes!"[816] that tramples the maxim ex injuria jus non oritur[817] and leaves undesirable normative footprints in the sands of legal and moral history.[818] The proposal may strike others as the emotional sacrifice of law on the altar of expedience[819] and the open-ended bellicization of political life to fill a vacuum left by the demise of the Cold War,[820] and thus a capitulation to terrorism.[821] Worst of all, some may fear that the rationalization of IHL by Western democracies, particularly if promiscuously applied to regimes not objectively barbarous, will be prologue to a vicious spiral of subsequent, and genuinely barbaric, counter-"rationalizations" by rogue-states and terrorists.[822]

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[813] Some post-structuralists have gone so far as to assert that the very use of the term "terrorism" is a Western ploy to assert the supremacy of the West while denying the worth of "competing perspectives" and stifling necessary debate—domestic and international—over the reality of disorder in the international system. *See, e.g.*, ADRIAN GUELKE, THE AGE OF TERRORISM AND THE INTERNATIONAL POLITICAL SYSTEM (1995); JAMES DER DERIAN, ANTIDIPLOMACY: SPIES, TERROR, SPEED, AND WAR (1992). For such critics, terrorism is an anti-imperialist reaction formation, and to the extent that claims to the moral high ground can reasonably be made they belong to the "terrorists." GUELKE, *supra*. Clearly, such ears are deaf to the arguments made in this Article.

[814] *See* Shannon E. French, *Murderers, Not Warriors: The Moral Distinction Between Terrorists and Legitimate Fighters in Asymmetric Conflicts*, *in* TERRORISM AND INTERNATIONAL JUSTICE 31, 33-42 (James P. Sterba ed., 2003) (calling for *jus ad bellum* considerations to be set aside on the ground that "determination of just cause is often far from obvious" as evidence by the fact that "[p]hilosophers, statespersons, political scientists, lawyers, and theologians worldwide hotly debate . . . just war theory").

[815] For some, use of terms such as "good" and "evil" is not only strategically unwise but also an act of immorality. *See* Gavin McCormack, *North Korea in the Vice*, 18 NEW LEFT REV. 5, 25 (2002) (describing reference to "Axis of Evil" in 2002 State of the Union Address to describe linkage between N. Korea, Iran and Iraq as "historically immoral" for its use of judgmental language); Alexander Solzhenitsyn, A World Split Apart, Commencement Address at Harvard University (June 8, 1978), *at* http://www.forerunner.com/forerunner/X0113_Solzhenisyns_Harvar.html (lamenting a world in which evil ideas and individuals prey upon those who internalize the "benevolent concept according to which" there is no evil inherent to human nature). Others accept the existence of good and evil but reject the image of the United States as the "'new Rome,' the giant colossus striding the world and claiming to speak on behalf of good and evil." Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11th*, 81 TEX. L. REV. 2013, 2053 (2003).

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[816] At the conclusion of *The Heart of Darkness*, the body of Kurtz, who failed to civilize the "savages" in the quest to extract ivory from the jungle, is discovered along with a report, written to advise the "International Society for the Suppression of Savage Customs," on the last page of which Kurtz had concluded that if savages would not accept the gift of civilizaiton it was necessary to "Exterminate all the Brutes!" to preserve the West. *See* JOSEPH CONRAD & D.C.R.A. GOONETILLEKE, HEART OF DARKNESS 33 (1999).

[817] Tranlated loosely from the Latin, "Right cannot originate from injustice."

[818] Psychologists and psychiatrists note a strong cognitive tendency to stereotype out-group adversaries as "barbarians"—emotional representatives of a monolithic, irrational evil that enjoys destruction and cannot be deterred—in order to rationalize foreign policies directed against the out-group and to protect the in-group's self-image from moral qualms about the effects upon innocent members of the out-group of in-group policies justified by this distorting image of the enemy. *See* Michele G. Alexander, Marilynn B. Brewer, & Richard K. Hermann, *Images and Affect: A Functional Analysis of Out-Group Stereotypes*, 77 J. PERS. SOC. PSYCH. 78, 79-81 (1999) (warning against this tendency); VAMIK D. VOLKAN, M.D., THE NEED TO HAVE ENEMIES AND ALLIES 131 (1988) (same). United States decisionmakers must take care that the description of terrorists as "barbarians" is conceptually limited so as not to envelop innocent members of societies from whence terrorists emerge.

[819] *See* Mofidi & Eckert, *supra* note 624, at 92 (suggesting the United States response to September 11th is the product of "inflamed passions and emotions" rather than a "commitment to the calm and rational, albeit slow, path of law."); James A.R. Nafziger, *The Grave New World of Terrorism: A Lawyer's View*, 31 DENV. J. INT'L & POL'Y 1, 6-7 (2002) (suggesting the military approach to terrorism is an irrational overreaction).

[820] The "ethos of conflict" thesis which postulates that a group, in a perilous conflict with an out-group, writes and follows a collective narrative that describes the in-group as virtuous and moral, the out-group, as evil and the sacrifice of the individual objectives of in-group members for the benefit of the in-group as the only path to peace, security and justice. This thesis has been applied to the United States after September 11th to suggest that the response to the War on Terror is a non-rational approach to the phenomenon of international terrorism that may actually fuel global conflict. *See* DANIEL BAR-TAL, SHARED BELIEFS IN A SOCIETY (2000) (elaborating the "ethos of conflict" thesis); *see also* Ervin Staub & Daniel Bar-Tal, *Genocide, Mass Killing, and Intractable Conflict*, *in* OXFORD

However, the best-laid plans of legal absolutists cannot bring to heel the world's most execrable, rapacious individuals, although, ironically, it is for them as law breakers, rather than for law followers, that all law is originally conceived.[823] Reclassifying terrorists as barbarians is a pleonasm inasmuch as both terms describe counter-civilizational entities, but it bears repetition that terrorists are functional equivalents of the fifth century Vandals who sacked Rome and cast the West into 1000-years of darkness; they will not cease attempting to topple our civilization until they succeed or are destroyed.[824] If ter-

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HANDBOOK OF POLITICAL PSYCHOLOGY 710, 727 (David O. Sears et al. eds., 2003).

[821] *See* Yehezkel Dror, *Terrorism as a Challenge to the Democratic Capacity To Govern*, *in* TERRORISM, LEGITIMACY, AND POWER 65, 73-74 (Martha Crenshaw ed., 1983) (contending that counterterrorist measures threaten to "barbarize" the international system); John T. Parry, *What is Torture, Are We Doing It, and What if We Are?*, 64 U. PITT. L. REV. 237, 262 (2003) (arguing the War on Terror threatens "harm to our concepts of rights"). One commentator, wedded to a judicial model that treats terrorism as a crime "no different than any other criminal offense," likens the "[differentiation] between classes of offenders" as the broadcast of the "moral weakness" of the society that distinguishes terrorists from other malefactors. *See* Gross, *supra* note 77, at 2, 95.

[822] *See* AXELROD, *supra* note 792, at 244-45 (conceding that a TIT-FOR-TAT strategy can more deeply entrench feuds between opponents); Levinson, *supra* note 816, at 2052 (warning, with particular reference to torture, against the "contagion effect" whereby the first violation of a taboo denatures the prohibition against the act and leads to a proliferation of an erstwhile taboo practice).

[823] The assumption that law is created to control, by threat of punishment, those who would otherwise be tempted to commit acts made illegal by positive rules, rather than to govern those who would already obey the legal sanction even in its absence, is of old vintage. *See* I *Timothy* 1:9-10 ("[L]aw is not made for a righteous man, but for the lawless and disobedient, for the ungodly and for sinners, for unholy and profane, for murderers of fathers and . . . mothers, for manslayers, [f]or whoremongers, for them that defile themselves with mankind, for menstealers, for liars, [and] for perjured persons . . . ."); *see also* THE FEDERALIST No. 51 (James Madison) ("If men were angels, no government would be necessary."); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 90 (1968) ("In international society . . . law is not effective against the Hitlers.").

[824] Some psychopathic individuals may simply be innately driven to destroy themselves and as much of the civilized world as they can. *See generally*

rorists are not objectively evil, nothing and no one can ever be.[825] The law-creating, law-abiding, peoples of the earth—a

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SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (James Strachey trans., 1961) (elaborating the psychoanalytic concept "death drive"). The Islamic terrorist organization Hamas fits this bill, proudly proclaiming that "death for the sake of Allah is its loftiest wish." Covenant of the Islamic Resistance Movement, Aug. 18, 1988, art. 8, *available at* http://www.mideastweb.org/hamas.htm. Recent Islamic terrorist attacks—suicide bombings of hotels and buses, sniper attacks against infants—reinforce this proclivity. *See* Louis Beres, *Palestinian Terrorism Now Takes Barbarism to New Lows*, JERUSALEM POST, Oct. 5, 2003 (chronicling the past several years of Islamic terrorism against Israelis). For many Islamic terrorists, their faith calls them "to invade and be killed for the sake of Allah, then invade and be killed, and then invade again and be killed." Covenant of the Islamic Resistance Movement, *supra*, at art. 15. In light of determination of psychopaths to wage war against our civilization and its innocents until victory or death, Elshtain implores us to recall the "'brutal indiscriminate slaughter of thousands of people in an instant, along with the sight of bodies dropping like debris from dizzying heights'" and warns that it is "important to take the measure of people who not only are capable of planning and executing [September 11th] but are gleeful about the lives lost . . . ." ELSHTAIN, *supra* note 663, at 153. It is well that we heed her lest we suffer the "corrosive effects of misdescription" and fail to treat terrorists for who and what they are. *Id.* at 12. This is no idle warning; the weaker side has not always lost an asymmetric conflict, and victory over terrorism is not a foregone conclusion. *See* French, *supra* note 815, at 33 (recalling the barbarian defeat of Rome in 453 A.D., the United States defeat of Great Britain in 1781, the Communist victory in Vietnam in 1975, and the Soviet defeat in Afghanistan in 1989). Either terrorism or civilization must yield to the other.

[825] Many relativist philosophers contest the argument that absolute, self-evident moral principles or "verdictive beliefs" exist independently of attitudes and contexts and that some things, persons, and ideas are objectively good while others are objectively evil. *See* Claudia Card, *Making War on Terrorism in Response to 9/11*, *in* TERRORISM AND INTERNATIONAL JUSTICE, *supra* note 815, at 171 (insisting that although "'evil'" is a "heavy, emotively laden term," the "concepts of evil and terrorism [are] philosophically too important to cede that vocabulary to political manipulators" and that, quite simply, "mass killing of unarmed civilians targeted as such . . . is evil"); Louis Rene Beres, *Straightening the Timber: Toward a New Paradigm of International Law*, 27 VAND. J. TRANSNAT'L L. 161, 167 (1994) (insisting, with reference to Adolf Hitler and Saddam Hussein, that evil exists in international relations, that it cannot be relieved via "structural reconfigurations"of legal institutions and that it must be confronted directly). Not all agree with the moral realist assertion that terrorists are exemplars of pure evil. Some reject the concept of evil; others are unwilling to define terrorists as evil; still others define evil as the slaughter of dolphins, the eating of meat, or some other value-system or practice. We may simply have to agree to disagree. Nevertheless, the public position taken by the Dalai Lama, a longstanding proponent of nonviolent methods of dispute resolution, in support of the use of military force against terrorism suggests that moral relativism on the question of

designation inclusive of the vast majority of Muslims[826]—must choose between civilization and barbarism, and creation and implementation of policy instruments entail decisions that feed into that choice. If regulators simply cobble together more sources of law and foist them upon soldiers rather than identify and support rules and institutions that promote the primary ends law is intended to serve—the creation, sustenance, and manifestations of the values that preserve humanity against chaos—regulators become handmaidens of evildoers. Soldiers fighting a desperate struggle on behalf of a civilization yet to fully awaken to the magnitude of the threat deserve no less than that their acts and omissions, unless they legitimately fit into categories of war crimes or crimes against humanity, be immunized by the official machinery of politics and law. The Private Ryans and Captain Ryans of this world are simply not enemies of all mankind; the Usama bin Ladens and their minions are this and more. Anti-civilizational criminals—those who deliberately set out to kill innocents *en masse*—do not deserve the entitlements of the laws they seek to ravage, yet evanescence of considerations of the justice of the cause for which combatants battle has utterly blurred moral distinctions and made possible the legal morass from which the events in the fictional scenario may well emerge. A slavish devotion to positive IHL, to which absolutists would commit us, would diminish respect for IHL[827] and even threaten"to lose the law itself,

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whether terrorists are evil is a minority view. *See* Laurie Goodstein, *Dalai Lama Says Terror May Need a Violent Reply*, N.Y. TIMES, Sept. 18, 2003, at A18.

[826] The official United States position is tolerant respect for Islam; it is the terrorists who claim a particular version of Islam directing them to murder innocent civilians and not the religion against which they blaspheme in claiming its sanction against whom the War on Terror is directed. *See* George W. Bush, *"Islam is Peace," Says President*, Off. Press Sec., Sept. 17, 2001 ("These acts of violence against innocents violate the fundamental tenets of the Islamic faith . . . . That's not what Islam is [] about. Islam is peace."). In curious constrast, some of the most vociferous European detractors of the Bush Doctrine and the War on Terror engage in domestic political practices suggestive of antipathy, if not outright intolerance, of their Muslim citizens. *See, e.g.*, Elaine Sciolino, *French Minister Threatens to Expel Extremist Muslims*, N.Y. TIMES, Sept. 20, 2003, at A4 (reporting plans by the French Minister of the Interior to close "extremist" mosques and become "very firm against [French Muslims]," to include expelling "radicals").

[827] *See* Henry M. Hart, Jr. *The Aims of Criminal Law*, 23 LAW & CONTEMP.

with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."[828] The re-incorporation of traditional norms of martial custom, reconsideration of the justice of the causes for which combatants fight and re-acquisition of an empathetic understanding of the moral cauldron in which the subjects of regulation experience combat, are intended not to banish law from war but to rescue IHL before it withers into an elegy for the civilization it owed a duty inter vivos.[829]

Law cannot cure every ill by the mere fact of its existence. Ultimately, all legal regimes are aspirational in that they are enforceable only if there is power and will behind them. Moreover, the formal legal equality of states does not translate into support for international order.[830] The empire of law requires an imperial power, and until it is disproven that the sole source of support for the enforcement of IHL is United States military power or the threat thereof,[831] it is counterproductive to alien-

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PROBS. 401, 421 (1958) (warning that indiscriminate use of positive law, where non-legal standards are a better lodestar for human conduct, "dilutes the force of . . . community condemnation as a means of influencing conduct").

[828] *See* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 685 n.59 (1998) (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 10, 1810)).

[829] Very simply, the "letter of the law is too cold and formal to have a beneficial influence on society," and the failure to take seriously non-legal sources of norms by which we might govern our social life constitutes acceptance of "[moral] mediocrity" and the "paraly[sis] of man's noblest impulses." Solzhenitsyn, *supra* note 816. Moreover, in moments of great crisis, civilization has the greatest need of the support of non-legal sources of norms: "[I]t will be simply impossible to stand through the trials of this threatening century with nothing but the support of a legalistic structure." *Id.* It is thus of no small moral concern that IHL should eschew the martial code and its stock of non-legal norms, which in practice exert a tremendous compliance pull, in the War on Terror. The re-emphasis on moral and other non-legal normative considerations thus supports compliance with IHL as well as the attainment of its humanitarian and pro-civilizational objectives. *See* FISHER, *supra* note 127, at 111 ("Other things being equal, the more elemental the rules are, the more inherent moral content there is and hence more . . . compliance . . . can be expected.").

[830] *See* SCHACHTER, *supra* note 73, at 6 ("Since we cannot deny the crucial role of power in the relations of States, we should seek to understand its specific impact on the international legal system.").

[831] It is difficult to seriously dispute that as of 2004 the United States is the global military hegemon and that in most instances where problems involving the maintenance of international peace and security and the defense of IHL arise "if

ate the United States and forfeit its prodigious energies in the humanization of war by clinging to a talismanic insistence upon the ICC.[832] It is further irrational, and even morally irresponsible,[833] to condemn United States opposition to the ICC as sovereigntist arrogance rather than hail a principled stand against the existential threat posed by Islamic terrorism armed with WMD. Simply put, leadership is essential, and not every pooling of sovereignty benefits the international community.[834] The proposal to do so here is one the United States has rejected largely upon moral considerations that do not register with the cult of legal absolutists peddling the ICC, an institution threatening to become the next "smelly little orthodoxies . . . contending for our souls."[835]

It is confounding that a mere two years after September 11th, rather than express common resolve,[836] the ardent con-

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the United States is not the solution, there is no solution." Harold Hongju Koh, *The Law Under Stress After September 11*, 31 INT'L J. LEGAL INFO. 317 (2003).

[832] The ultimate answer to the question of whether the ICC is merely a flawed but improvable institution or is in fact, as this Article asserts, an inescapably dangerous tool ripe for exploitation by terrorists and their state-sponsors, remains to be determined by future events. *See* BEST, *supra* note 20, at 400 (cautioning against the premature judgment of international criminal tribunals).

[833] Absolute adherence to the ICC is prone to unleashing greater evils than would be suppressed by the application of instruments of policy and law to the defeat of terrorism which the ICC would be likely to criminalize.

[834] *See* Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT'L L. 291, 297 (recognizing that on narrow grounds of interests, "a plausible case can certainly be made" for United States abstention from participation in the ICC).

[835] IV GEORGE ORWELL, THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 460 (Sonia Orwell & Ian Angus eds., 1968) (referring to socialism and fascism).

[836] *See* James B. Motley, *Coping with the Terrorist Threat: The U.S. Intelligence Dilemma*, *in* INTELLIGENCE AND INTELLIGENCE POLICY IN A DEMOCRATIC SOCIETY, *supra* note 706, at 165 (opining that one might expect that "[c]ompassion [would be] stirred when . . . [people] become . . . victims of fanatical terrorists"). At first blush it appears September 11th is being treated by United States allies as an attack not so much upon the West as upon the United States as the primary power. If true, the admonition that to understand terrorism it is first necessary to understand "what is happening to whom, where, when, how, why and with what outcomes and effects," takes on additional significance. MARTIN SLANN & BERNARD SCHECHTERMAN, MULTIDIMENSIONAL TERRORISM 3 (1997) While collective security has always been bedeviled by the free-rider problem, that the United States should be forced to go it alone at a time when the

sortium championing the ICC[837] will not concede that, absent a central executive, United States military operations (even if unauthorized by the UN) enhance the security of the entire international community,[838] that agnosticism of real-world military operations should temper their absolutism and that the United States deserves a margin of appreciation in its titanic struggle.[839] However, our civilization is in the crucible, and we must soberly face the fact that we no longer have the post-modernist luxury of pretending that morality (or normativity) and law are estranged cousins, or that all wars are equally unjust, or that it is beyond our ken to sift through the moral confusion engendered by sophists and autists who have enshrined their professed ignorance about the ultimate metaphysical foundations of justice in the provisions of modern IHL,[840] to determine which of the causes for which combat-

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necessity of collective action ought arguably to be more apparent than at any time since World War II does not augur well. *See* Edward A. Amley, Jr., *Peace by Other Means: Using Rewards in U.N. Efforts to End Conflicts*, 26 DENV. J. INT'L L. & POL'Y 235, 242-43 (critiquing free-rider problem in U.N. collective security system).

[837] *See supra* note 96 and accompanying text (describing coalition of states and NGOs which possess little or no military capacity and no responsibility for international peace and security). Many of the staunchest supporters of the ICC are weak states that have "moved beyond power" into a post-realist normative framework for their harmonized foreign policies in which the use of force is inconceivable except where authorized by the U.N. and conducted multilaterally. *See* James Dao, *Ideas & Trends: Solitaire; One Nation Plays the Great Game Alone*, N.Y. TIMES, July 7, 2002, at D1 (illuminating European preference for multilateral institutionalist approaches to security).

[838] *See* REISMAN & BAKER, *supra* note 108, at 39-40 (stating that international law is merely a form of "authorized coercion" that requires, in the absence of central authority with a monopoly over the use of force, individual states to enforce it).

[839] The term "margin of appreciation" refers to the observation that there is a legal disjunction between the "black letter of the [UN] Charter and the bloody reality of world politics" and that states, particularly those responsible for the maintenance of systemic order, are to be granted some latitude to self-interpret their obligations under IHL in the discharge of their duties, particularly with regard to the use of force. Id. at 38 (distinguishing between "text myth system" of the U.N. Charter, in which the provision of law proscribing unauthorized use of force is reflexively applied, and the "operational code" system, in which uses of military force in certain contingencies, such as collective defense, are legitimized notwithstanding the black letter of the law).

[840] *See Notebook*, NEW REPUBLIC, Nov. 5, 2001, at 12 (denying that there is

ants fight are virtuous and which are vile. We need not become servants to law; rather, law must be made to serve us,[841] and IHL is not, any more than domestic law, a suicide pact.[842] Evaluating the rectitude of the cause for which combatants fight is far more essential to an ethically legitimate theory of IHL than an assessment of the methods and means they employ or a tabulation of the casualties that result. We need not navigate a moral maze or parse legal texts to assert that the cause to which the United States and its allies[843] are committed—preserving the last best hope for human freedom and dignity—is infinitely more noble than that of the terrorists.[844] Application of a differential legal standard in the war on terror is an act of moral indignation in the face of a great evil threatening all with a stake in humanity. All may seek and enjoy the protection of the laws, but those who do must themselves re-

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any nonarbitrary method of differentiating between descriptions of what is just or good) (citing interview with Stanley Fish); *but see* STEPHEN L. CARTER, CONFESSIONS OF AN AFFIRMATIVE ACTION BABY 145 (1991) (stating that to excuse acts of evil and immorality along the lines of the argument that "Hitler wasn't evil, just insane" is a "pile of garbage"). To escape the slough of relativist despond, one must "never lose the capacity . . . to judge ourselves and other people." *Id.* at 144.

[841] "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[842] *See* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

[843] *See supra* notes 508, 779, 838 (discussing advantagees to a multilateral approach to international relations). Ideally, the United States will secure the assistance of other states in implementing a rationalized IHL, but the defense of civilization is such a vital imperative that it must be prepared to proceed unilaterally. *See* Joseph S. Nye, *Seven Tests Between Concert and Unilateralism*, 66 NAT'L INTEREST 5, 10-12 (2002) (advocating United States unilateral action where vital survival interests are at stake, where it helps advance multilateral interests, and where multilateralism would be "recipes for inaction" or contrary to United States values).

[844] "It is essential to condemn what must be condemned, but swiftly and firmly." ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH (Justice O'Brien trans., 1960). Levinson urges us to be sure that Western democracies are "better than their enemies." Levinson, *supra* note 816, at 2052. We can be safely sure that we are.

spect the reciprocal rights of others. Legal absolutism invites catastrophe. The paradigmatic transformation toward a rationalized IHL that unabashedly lets slip the dogs of the bellum americanum [845]is no parochial approach to the "laws of war;" rather, it is an affirmation of a universal vision of law with unbroken ties to moral reason and judgment.[846]

If we screw our civic and moral courage to the sticking point[847] and rise to the "new height of vision" to which we were summoned, presciently, by the Russian Nobel laureate Alexander Solzhenitsyn a quarter-century ago, will we see the world not merely as we would wish it to be but as it is?[848] The barbarians are at the gates of civilization;[849] they are evil and mean us grievous harm. It falls to us to decide whether IHL is to be crafted into the battering ram that forces a breach or the sword that sweeps away the hordes, and whether the inheritance of future generations is to be a civilization wisely governed by law or a darkling plain[850] haunted by the drifting ghosts of its humanizing promise.

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[845] *See* WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc. 1 ("Cry havoc and let slip the dogs of war!").

[846] In arguing that the War on Terror may require an "Extra-Legal Measures" model of constitutional law which permits decisionmakers to transcend the established domestic legal order to "protect [] the nation . . . and the public in the face of calamity," Gross contends that it is possible to simultaneously defeat terrorism while "preserv[ing] the long-term relevance of, and obedience to, legal principles, rules, and norms." Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 112 YALE L.J. 1011, 1023-24 (2003). "While going outside the legal order may be a 'little wrong,' it . . . facilitate[s] the attainment of a 'great right,' namely the preservation not only of the constitutional order, but also of its most fundamental principles and tenets." *Id.* at 1024. The argument that preservation of domestic law may require violating it in extreme circumstances fits neatly into international context, for "[w]hen government acts in a certain way that is deemed necessary to . . . safeguard the nation, . . . its actions are imbued with affirmative moral value, i.e., they are morally legitimate. If acting extralegally is the right thing to do (pragmatically), . . . it is the right thing to do whichever way you look at it." *Id.* at 1100.

[847] *See* Solzhenitsyn, *supra* note 816 ("The Western world has lost its civic courage . . . [F]rom ancient times a decline in courage has been considered the beginning of the end. . . .").

[848] I do not suggest that we should abandon long-standing hopes for the perfectibility of man, the evolution of morality to a loftier plane or general adherence to a global ethos of peace and cooperation. I only contend that it is perilous to pretend that in a world of metastatic terrorism we have reached this destination. There may never be peace in our time; rather than a perpetual peace, we may be consigned by fate to perpetual war. *See* Ralph Peters, *Constant Conflict*, 27 PARAMETERS 4, 4 (1997) (warning that "[w]e have entered an age of constant conflict"marked by civilizational conflict and that "[a]t any given moment for the rest of our lifetimes, there will be multiple conflicts in mutating forms around the globe").

[849] The reference is to EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE ch. XXXI, § 1 (describing march to the gates of

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Rome by barbarians bent on sacking Roman civilization in 453 A.D.)

[850] "And we are here as on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night." Matthew Arnold, "Dover Beach" (1867).

OF SUMMONSES, REQUIRED RECORDS AND ARTIFICIAL ENTITIES: LIBERATING THE IRS FROM ITSELF

Christopher M. Pietruszkiewicz[*]

To most Americans, the term "Boss" conjures up ideas of refined clothing, a corresponding economic outlay but no tax benefits.[1] For an increasing population of Americans, however, BOSS refers to refined tax shelter, no economic outlay and extraordinary tax savings.[2] The former depicts sophistication while the latter depicts sophisticated tax evasion. When the truth about BOSS became evident, its offspring, "Son of BOSS," emerged with minor iterations that retained the same lineage as BOSS.[3] To be effective in the administration of the tax laws of the United States, the Internal Revenue Service cannot rely on investigative practices that were in existence when John F. Kennedy was President, the Pontiac GTO was introduced as the first muscle car, the Nehru jacket was fashionable and Beatlemania invaded North America. BOSS and its progeny are represenative of a new era of tax shelters that are designed to significantly reduce the tax liability of a taxpayer without economic substance. In effect, tax shelters generate tax losses without a corresponding economic loss. In the late 1970s and early 1980s, tax shelters began to proliferate and Congress responded with the enactment of the Tax Reform Act of 1986.[4] Adoption of the passive activity loss rules that prevents a taxpayer from reducing income from wages, interest and dividends by tax sheltered losses incurred through partnerships.[5] Tax shelters have become more sophisticated and focus on corporate entities. Congress attempted to address corporate tax shelter problems through substantive law by enacting §§ 6011, 6111 and 6112 of the

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[1] 26 U.S.C. § 162. Yeomans v. Commissioner, 30 T.C. 757, 767-69 (1958).

[2] BOSS is an acronym for Bond and Option Sales Strategy. Typically, taxpayers act through a partnership by contributing cash to a newly formed foreign corporation in exchange for common stock. Another investor contributes additional capital to the corporation in exchange for preferred stock. The foreign corporation acquires additional capital through bank financing for which the bank obtains a security interest in securities acquired by the foreign corporation equal to the amount borrowed. The foreign corporation makes a distribution of the encumbered securities to the partnership that holds the common stock. This reduces the remaining value of the foreign corporation's common stock to zero. It is understood by all parties that the foreign corporation will, however, repay the debt to the financing bank with other assets. Nonetheless, because the distribution to the partnership is subject to the bank debt, the parties take the position that the distribution is zero. The partnership is treated as having subsequently disposed of the stock of the foreign corporation giving rise to a tax loss equal the excess of the partnership's original basis in the stock (the amount paid for the common stock) over the fair market value of the common stock after the distribution of the securities (zero). In a subsequent year, the bank debt is repaid from other assets of the foreign corporation. Although the parties previously treated the debt as reducing the amount of the earlier distribution to zero, the return position of the taxpayers is that the foreign corporation's repayment of the debt is not treated as a distribution on its common stock. These purported losses are not allowed for federal income tax purposes as they do not represent bona fide losses reflecting actual economic consequences. *See* I.R.S. Notice 99-59, 1999-2 C.B. 761.

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[3] "Son of BOSS" uses a series of contrived steps in a partnership interest to generate artificial tax losses designed to offset income from other transactions. A taxpayer purchases a call option and simultaneously writes a similar offsetting call option. The offsetting positions are then transferred to the partnership. The taxpayer purports to have a positive basis in the partnership interest equal to the cost of the purchased call options even though the taxpayer's net economic outlay to acquire the partnership interest and the value of the partnership interest are zero. The taxpayer claims that the basis in the partnership interest is not reduced for the partnership's assumption of the taxpayer's obligation with respect to the call options. An artificially high basis in the partnership results in claiming deductible losses that can shelter other income by the taxpayer by immediately selling the taxpayer's partnership interest even though the taxpayer has no corresponding economic loss. IRS LS-831. Just as under BOSS transactions, taxpayers invested in Son of BOSS transactions are denied purported losses resulting from the tax shelter inasmuch as the losses do not represent bona fide losses reflecting actual economic consequences as required under the Internal Revenue Code.

[4] Pub. L. No. 99-514, 100 Stat. 2085 (1986).

[5] Section 469 of the Internal Revenue Code limits the current deductibility of losses to activities in which a taxpayer materially participates.

Internal Revenue Code.[6] The substantive law, however, will not eliminate the tax shelter problem without enforcement by the Internal Revenue Service. While external forces exist that restrict the ability of the Internal Revenue Service to assess and collect an appropriate amount of tax, internal forces, in effect, magnify this problem.

The Supreme Court repeatedly holds that the summons authority of the United States is expansive and that statutory construction of this authority should embrace the mandated obligation of the Internal Revenue Service to enforce the tax laws of the United States.[7] Yet, the Internal Revenue Service, notwithstanding an open invitation by the Supreme Court for over twenty years, chooses not to compel taxpayers, pursuant to its summons authority, to produce documents required by statute or to create documents that a taxpayer is otherwise required to maintain. We do not need new laws to raise revenue; we need enforcement of our current laws.

I am not talking about trampling over the attorney-client privilege, the work product privilege or the Fifth Amendment. I am merely suggesting that we have a compliance problem and we must finds ways to fix it. This proposal does not affect honest taxpayers; it does, however, affect those who are not honest by easing the burden of the government in assessing and collecting those taxes that are due under current law. After all, the efficacy of the federal tax system must "assure that taxpayers pay what Congress has mandated and . . . prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers."[8]

While an estimate of voluntary compliance in the reporting of legal and illegal income is difficult, it is not impossible.[9] In 1983, the Internal Revenue Service and analysts agreed that unreported taxable income in the United States averages ten to fifteen percent of total taxable income.[10] In all likelihood, these estimates were conservative.[11] To combat this trend, in the early 1980s, Congress provided the Internal Revenue Service with an arsenal of provisions designed to raise one-third of the total revenue estimated by the 1982 Tax Equity and Fiscal Responsibility Act.[12]

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[6] *See infra* notes 12 and 175 and accompanying text.

[7] A narrow interpretation should not be supported absent specific congressional intent to the contrary. *See* United States v. Euge, 444 U.S. 707, 715-16 (1980); United States v. Bisceglia, 420 U.S. 141, 150 (1975); Donaldson v. United States, 400 U.S. 517, 536 (1971); United States v. Powell, 379 U.S. 48, 53-54 (1964); United States v. Chamberlain, 219 U.S. 250, 269 (1911).

[8] United States v. Bisceglia, 420 U.S. 141, 146 (1975)

[9] *See* GAO, IRS Audit Rates: Rate for Individual Taxpayers Has Declined But

The effective use of these tools, however, was short lived. In response to allegations of taxpayer abuse by the Internal Revenue Service, Congress conducted a series of hearings that resulted in the enactment of three Taxpayer's Bills of Rights that added some 140 procedural provisions to the Internal Revenue Code, which previously consisted of approximately 2600 provisions.[13] In response to these enactments, the

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Effect on Compliance is Unknown, 14 (2001), GAO-01-484; Amy Hamilton, The Tax Gap Game and Inklings of a Focus on Noncompliance, 98 Tax Notes Today 101-3 (2001), LEXIS 98 TNT 101-3.

[10] Internal Revenue Service, Office of the Assistant Commissioner of Planning and Research Division, Income Tax Compliance Estimates for 1973-81 (July 1983); James S. Henry, *Noncompliance With U.S. Tax Law: Evidence on Size, Growth, and Composition*, *in* INCOME TAX COMPLIANCE: A REPORT OF THE ABA SECTION OF TAXATION INVITATIONAL CONFERENCE ON INCOME TAX COMPLIANCE 17 (P. Sawichi ed., American Bar Ass'n, 1983); *see also* Michael J. Graetz & Louis L. Wilde, *The Economics of Tax Compliance: Fact and Fantasy*, 38 NAT'L TAX J. 355, 355 (1985).

[11] Graetz & Wilde, *supra* note 10, at 357.

[12] *Id* at 355. These measures included increased and new penalties for failure to file tax returns under § 6651, for failure to file information returns under §§ 6041A, 6049, 6050E, 6053(c), 6652, 6678, 6686, 6706, and 6708, for substantial understatements of tax liabilities under § 6661, for aiding and abetting understatements of tax penalties under § 6701, for filing of frivolous returns under § 6702, and for failure to supply taxpayer identification numbers under § 6676(a). In addition, new requirements were enacted that required registration of tax shelters with the Internal Revenue Service and for maintaining lists of tax shelter investors under §§ 6111, 6112, 6707, and 6708 and providing authority for the Internal Revenue Service to seek injunctions against promoters of abusive tax shelters under § 7408.

[13] Technical and Miscellaneous Revenue Act of 1988 (Taxpayer Bill of Rights), Pub. L. No. 100-647, 102 Stat. 3342, contained twenty-one provisions. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996) contained more than forty provisions. Internal Revenue Service Restructuring and Reform Act of 1998 (Taxpayer Bill of Rights 3), Pub. L. No. 105-206, 112 Stat. 685 (1998) contained more than seventy provisions. *See* Leandra Lederman, *Of Taxpayer Rights,*

Internal Revenue Service was forced to divert the dwindling numbers of Internal Revenue employees to customer service functions instead of to tax assessment and collection.[14] In addition, these hearings produced disincentives for agents and officers to vigorously enforce the internal revenue laws.[15]

Former Commissioner of the Internal Revenue, Charles

Wrongs, and a Proposed Remedy, 18 TAX NOTES 1133 n.2 (May 22, 2000). Many of the stories recounted in the congressional oversight hearings could not be subsequently confirmed. A General Accounting Office report concluded that Congressional testimony concerning various allegations of taxpayer abuse by Internal Revenue employees could not be verified. *See* GAO/OSI-99-9R, Doc. 2000-11360, 2000 Tax News Today 80-13 (Apr. 25, 2000); Ryan S. Donmoyer, *Secret GAO Report Is Latest to Discredit Roth's IRS Hearings*, TAX NOTES 463 (Apr. 24, 2000).

[14] Since 1992, the overall number of Internal Revenue employees has fallen sixteen percent from 114,819 in 1992 to 97,914 in 2002. The Transactional Records Access Clearinghouse (TRAC) (in association with Syracuse University), National Profile and Enforcement Trends Over Time of Internal Revenue Service Staff, *at* http://trac.syr.edu/tracirs/trends/current/irsStaff.html. More telling, however, is the decline in permanent employees—from 113,028 in 1992 to 83,535 in 2002—a drop of twenty-six percent. *Id.* These employees process over 232 million tax returns, collect $2.1 trillion in revenues, disburse $284 billion in refunds, and respond to 94 million requests for assistance. *Id.* The IRS and Its Responsibilities, *at* http://trac.syr.edu/tracirs/atwork/current/irsResponsibilities.html.

[15] A constitutional cause of action was created by the Supreme Court in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

> While [a] *Bivens* [action] was created in 1971, its remedy was rarely used in the context of the assessment and collection of taxes until Congress conducted a series of oversight hearings branding the Internal Revenue Service and its employees as renegades . . . . [This label] continued through the enactment of the "Ten Deadly Sins" in 1998 that mandated summarily firing Internal Revenue employees for committing one of the "sins," including the harassment of a taxpayer.

See Christopher M. Pietruszkiewicz, *A Constitutional Cause of Action and the Internal Revenue Code: Can You Shoot (Sue) the Messenger?*, 54 SYR. L. REV. 1, 3 (2004).

As a result, the number of levies dropped from 2.6 million in 1993 to 447,201 in 2001 while the number of liens fell from 959,356 to 428,379 and the number of seizures to collect unpaid taxes declined from 9626 to 255 during the same period. *See* TRAC, *supra* note 14, Administrative IRS' Enforcement Starts to Recover, *at* http://www.trac.syr.edu/tracirs/newfindings/current/. These numbers increased slightly in 2002—667,000 levies, 492,000 liens, and 364 seizures. *Id.* There is support for the proposition that the reduction in enforced collection is "premised on the threat of an action under *Bivens* and the enactment of the 'Ten Deadly Sins.'" Pietruskiewicz, *supra*.

Rossotti, indicated that lost revenue from noncompliance is $200,000,000,000.[16] Compared to the 1980s when Congress first attempted to manage the deteriorating levels of tax compliance, the current lack of compliance portrays a bleak picture and the outlook for the future is even more distressing. The most accurate measuring stick to determine taxpayer compliance is to consider the tax gap—the difference between the amount of income tax voluntarily reported and paid by taxpayers in a particular year and the amount of income taxes owed by taxpayers in the same year.[17] In 1981, the estimated tax gap was $76 billion, while in 1992 the tax gap rose to $128 billion and to $195 billion in 1998.[18] In fact, some suggest that a more accurate figure is $300 billion, which does not account for the lost taxes associated with illegal income such as drug trafficking, money laundering, gambling and prostitution.[19] These numbers suggest that non-compliance is spreading and enforcement is not keeping pace.

More significantly, audits of large corporations accounted for only .5% of all audits but produced 75% of the findings by auditors of additional taxes owed measured in dollars.[20] Small and mid-size businesses accounted for 2.5% of all audits and produced 5.3% of all underreporting.[21] As such, artificial entities accounted for only 3% of audits conducted but 80.1% of underreporting. Individuals on the other hand accounted for 97% of the audits but only 19.9% of underreporting.[22] "Between 1992 and 2000, the number of tax returns increased thirteen percent but the staff of the Internal Revenue Service (IRS) contracted by seventeen percent and the audit rate plummeted from 1.68% in 1996 to 0.49% in 2000."[23] And, this is the first time in history that the audit rate of the Internal Revenue Service dropped below less than one-half of one percent. The trend since 2000 has not changed.[24] Inasmuch as the Internal Revenue Service cannot control the external forces, it must focus on the internal ones. The compelled production of documents under my proposal permits the Internal Revenue Service to obtain those documents necessary to more efficiently account for 80% of all underreporting because this proposal relates specifically to artificial entities.

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[16] Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 916-17 n.277 (2002).

[17] *See* Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 694 (2003).

[18] Lynn A. Baker & Charles Silver, *Introduction: Civil Justice Fact and Fiction*, 80 TEX. L. REV. 1537, 1543 (2002).

[19] DONALD L. BARLETT & JAMES B. STEELE, THE GREAT AMERICAN TAX DODGE, 12 (Little, Brown and Co. 2000).

[20] TRAC, *supra* note 14, Most Tax Under-Reporting IRS Finds is Among Large Corporations, *at* http://www.trac.syr.edu/tracirs/trends/current/andDollarsgph.html. Large corporation are corporations reporting more than $250 million in income. *Id.*, IRS District Service Center and International Audits and IRS Auditor Findings of Additional Taxes Owed, Federal Income Tax Returns of Individuals and Corporations, Fiscal Year 2002, *at* http://www.trac.syr.edu/tracirs/trends/current/audDollars.html.

[21] *Id.* Most Tax Under-Reporting IRS Finds Is Among Large Corporations, *at* http://www.trac.syr.edu/tracirs/trends/current/andDollarsgph.html. Small and midsize corporations report less than $250 million. *Id.*, IRS District, Service

In recent times, the Government, and in particular, the Internal Revenue Service, has been instructed to do more with less, and the political reality is that this is not likely to change. The most serious constraint for the Internal Revenue Service is not the authority granted to it by Congress but the absence of funding to implement its authority. Congress has not provided sufficient appropriations and its current workforce, declining in number, is focused on customer

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Center and International Audits and IRS Auditor Findings of Additional Taxes Owed, Federal Income Tax Returns of Individuals and Corporations, Fiscal Year 2002, *at* http://www.trac.syr.edu/tracirs/trends/current/andDollars.html.

[22] *Id.*, Most Tax Under-Reporting IRS Finds Is Among Large Corporations, *at* http://www.trac.syr.edu/tracirs/trends/current/audDollars.gph.html.

[23] Baker & Silver, *supra* note 18, at 1543.

[24] Audits of corporations dropped from 2.97% in 1993 to .88% in 2002. TRAC, *supra* note 14, IRS Face to Face Audits of Corporations, *at* http://www.trac.syr.edu/tracirs/trends/v08/audit.corpgph.html. Audits of pass through entities have fallen from 5.5% in 1993 to 2.9% in 2001. *Id.*, Audits of "Passthrough Entities," *at* http://trac.syr.edu/tracirs/trends/v08/passthroughentitiesG.html. Audits of individuals accounted for .92% of all IRS audits in 1993 to .57% in 2002. *Id.*, IRS Audits of Individuals: NonBusiness Returns, *at* http://www.trac.sys.edu/tracirs/trends/v08/audwagegph-2.html. Between 1988 and 2002, the permanent staff of the Internal Revenue Service has been reduced 30% from 119,284 in 1988 to 83,535 in 2002. *Id.*, IRS Staff Has Declined While Returns Have Increased, *at* http://trac.syr.edu/tracirs/irsStaffG.html.

service.[25] These external forces prevent the Internal Revenue Service from ensuring that our voluntary system of assessment maintains appropriate levels of taxpayer compliance, and this has an adverse impact on taxpayer behavior. While the government is forced to do more with less, taxpayers are becoming more sophisticated.

In the last fifteen years, Congress has enacted three versions of the Taxpayer Bill of Rights, all designed to protect the rights of the taxpaying public.[26] This proposal provides a limited offset, not through substantive reform but via a procedural device which more efficiently uses current investigative tools to detect, and ultimately deter, those who seek to avoid the reporting and payment of taxes. This paper will not address the substance of the tax code. Instead, I will focus this discussion on enforcement of the tax code.

It is implausible to believe that increased funding to support an aggressive and effective enforcement vehicle is forthcoming. The alternative is to develop effective enforcement under current funding allocations. This means utilizing the broad scope of the IRS's investigative powers to most effectively deploy its resources. The IRS must have access to information and disclosure. The required records doctrine provides ample latitude for the Internal Revenue Service to obtain the records necessary to determine tax consequences in most cases.

Under § 6001 of the Internal Revenue Code, Congress notifies a taxpayer of what that taxpayer is required to maintain to support its return position. The Internal Revenue Service, through its regulations under § 6001, may specifically identify items to satisfy this standard. The actions of the Internal Revenue Service, however, are almost always reactionary. With the ever-changing sophistication of tax advisors, the Internal Revenue Service cannot by regulation anticipate future needs. However, the summons power of the

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[25] *See* Martha Middleton, *The Tax Gap: Why Don't People Pay Up?*, 69 A.B.A. J. 572, 572 (1983) (noting that Internal Revenue Service does not have sufficient resources or agents).

[26] *See supra* note 13 and accompanying text.

Internal Revenue Service provides the bridge for it to access information not specifically identified under § 6001 and its implementing regulations.

The broad summons authority provided to the Internal Revenue Service by Congress, combined with the required records doctrine and the artificial entity doctrine, provides justification to obtain the records that the Internal Revenue Service needs to verify that the tax liability reported by artificial entities is accurate. Should a corporate entity not maintain the documents necessary to substantiate its return, nothing prevents the Internal Revenue Service from compelling the production of a document except the internal restrictions imposed by the Internal Revenue Service on itself.

The hallmark of our tax system is voluntary compliance. However misleading that term, simple reliance on voluntarily administered information gathering and reporting is insufficient, and the growing tax gap provides ample evidence. The use of the required records doctrine, combined with application of the artificial entity doctrine and the summons power of the Internal Revenue Service, should require the mandatory production of records necessary to corroborate tax return positions.

In my view, information from documents required by the Internal Revenue Service to be maintained in corporate records is not subject to Fifth Amendment protection, whether such documents are in fact maintained. While the Internal Revenue Service disclaims this view, its rationale has been surpassed by the changing times and should be discarded. And, by aborting its position, the Internal Revenue Service can sustain the critical flow of information to protect the integrity of the system. The goal is results and "[i]f Congress has the power to tax, the taxpayer must necessarily have the correlative duty to pay the tax . . . . Thus, unless Congress can compel payment and impose sanctions upon non-payment of a particular tax, it can hardly be said that Congress has the power to levy that tax."[27]

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[27] Brief for the United States, Grosso v. United States, 390 U.S. 62 (1968) (No. 12).

This paper demonstrates that the summons authority of the Internal Revenue Service can and should be used to compel the production of documents of artificial entities that are records required to be maintained by statute, as interpreted by regulation. And, in circumstances in which documents are non-existent at the time of the issuance of a summons, such documents must be created in response to a summons as long as those documents are otherwise required records under the statutory scheme to justify a particular tax return position.

Artificial Entities

An artificial entity has an institutional identity that is separate and distinct from the individuals involved in the entity.[28] They account for just over eighty percent of underreported income.[29] This proposal assists the Internal Revenue Service in obtaining access to the types of information that is necessary to reduce this percentage. Specifically, while it is clear that Fifth Amendment protections extend to individuals when testimonial communication violates the prohibition against self-incrimination, it is also clear that such a privilege does not extend to artificial entities.[30] Individuals that act as representative of artificial entities assume the rights, obligations, duties and privileges of the entity of which they are an agent or officer. In their representative capacity, these individuals cannot claim a privilege against self-incrimination.[31]

This doctrine became known as the collective entity rule (or artificial entity rule) and had its beginnings in 1906 in *Hale v. Henkel*.[32] In rejecting the notion that a corporate officer could invoke the Fifth Amendment privilege on behalf of a corporation, the Court recognized a "clear distinction . . . between an individual and a corporation, and . . . the latter has no right to refuse to submit its books and papers for an examination at the suit of the State."[33] Since the corporation "is a creature of the State," its powers are limited by the State and may utilize this right of corporate oversight to require the production of corporate records.[34]

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[28] *See* Brandon Bortner & Douglas Miller, *Procedural Issues*, 40 AM. CRIM. L. REV. 933, 946 (2003).

[29] TRAC, *supra* note 14, Most Tax Under-Reporting IRS Finds Is Among Large Corporations, *at* http://trac.syr.edu/tracirs/trends/v08/audDollarsgph.html.

[30] U.S. CONST. amend. V provides in part that "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."

[31] United States v. White, 322 U.S. 694, 699 (1944). *See* ROBERT S. FINK, TAX FRAUD—AUDITS, INVESTIGATIONS, PROSECUTIONS § 10.04[1] (Matthew Bender ed., 1980).

[32] Hale v. Henkel, 201 U.S. 43 (1906). In *Hale*, a corporate officer was served

The *Hale* ruling recognized a departure from an 1886 case which determined that the "compulsory production of the private books and papers . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment . . ." and that such compulsion violated the Fifth Amendment.[35] Thus, the Supreme Court in *Hale* created an exception to the original 1886 *Boyd* rule that corporate books and records are not "private papers" that may otherwise be protected by the Fifth Amendment. While the corporate officer in *Hale* was protected by his own individual immunity, the

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with a subpoena ordering him to produce corporate records and to testify concerning certain corporate transactions. *Id.* at 44. The corporate officer was granted personal immunity; however, the officer sought to resist the demand for the records by asserting a Fifth Amendment privilege on behalf of the corporation. *Id.* at 66.

[33] *Id.* at 74. *See* Essgee Co. v. United States, 262 U.S. 151, 155-57 (1923); B & O R.R. v. Interstate Commerce Comm'n, 221 U.S. 612, 622-23 (1911); Dreier v. United States, 221 U.S. 394, 400 (1911). This is true notwithstanding English precedent at the time of adoption of the Fifth Amendment which extended the privilege against self-incrimination to individuals and corporate records. *See* Rex v. Purnell, 95 Eng. Rep. 595 (K.B. 1748); Rex v. Cornelius, 93 Eng. Rep. 1133 (K.B. 1744); Regina v. Mead, 92 Eng. Rep. 119 (K.B. 1703); Rex v. Worsenham, 91 Eng. Rep. 1370 (K.B. 1701); *see also* Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 56-57 (1986).

[34] Id. at 74-75. The federal government

> possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the [federal] government . . . in the vindication of its own laws are the same as if the corporation had been created by an act of Congress.

Wilson v. United States, 221 U.S. 361, 384 (1911).

[35] Boyd v. United States, 116 U.S. 616, 634-35 (1886). In *Boyd*, a court order directed partners to produce an invoice received by the partnership. *Id.* at 618. The partners produced the invoice, but maintained that the court order violated the Fifth Amendment. *Id.*

Supreme Court did not address whether a corporate officer could invoke his personal Fifth Amendment privilege in response to a request for corporate records, as opposed to individual records. Five years after *Hale*, the Court determined that the personal privilege did not serve to protect the institutional records of the corporation.

In *Wilson v. United States*, the Supreme Court determined that the Fifth Amendment does not extend to corporate records even if the production of those records is testimonial and is incriminating to the party producing them.[36] The Court recognized that while the Fifth Amendment protects the party compelled to produce private books and papers, it does not protect corporate records.[37] Since this request pertained to corporate records, the *Wilson* Court held that the records belonged to the corporation and therefore could not be private or personal records.[38] In *Dreier v. United States*, a companion case, the Court likewise held that a subpoena addressed to the corporate custodian did not bring the Fifth Amendment into play.[39] Accordingly, the Court determined that whether the subpoena was issued to a corporation or a custodian was irrelevant.[40]

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[36] *Wilson*, 221 U.S. at at 377. In *Wilson*, a grand jury issued a subpoena to a corporation demanding the production of corporate records that the president of the corporation possessed. *Id.* at 367-68. The president refused to produce the books asserting that the Fifth Amendment prohibited the compelled production of books that he possessed that were incriminating to him in a personal capacity. *Id.* at 369.

[37] *Id.* at 380.

> [I]n the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction.

Id.

[38] *Id.* at 384-85.

> [The president] held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The [State's] reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion . . . . [T]he visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.

Id.; *see* United States v. Blackman, 72 F.3d 1418, 1426-27 (9th Cir. 1996); United States v. Medlin, 986 F.2d 463, 467-68 (11th Cir. 1993); *In re* Sealed Case, 877

The collective entity rule was further developed by *United States v. White*, which equated a labor union to a corporation for purposes of Fifth Amendment protection.[41] Following its earlier decisions in *Hale*, *Wilson* and *Dreier*, the Court held that the Fifth Amendment privilege applies only to natural individuals and protects only private papers.[42] In doing so, it seemed to abandon visitatorial powers of the state over corporations as the basis for preventing use of the Fifth Amendment, at least for unincorporated associations.[43]

Bellis v. United States followed closely the reasoning of *Wilson* and *White* and removed from the protection of the

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F.2d 83, 85-86 (D.C. Cir. 1989); United States v. Joseph, 560 F.2d 742, 746 (6th Cir. 1977); United States v. Ruggeiro, 425 F.2d 1069, 1071 (9th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971). An S corporation is treated as a corporation for purposes of invoking the Fifth Amendment even though an S corporation is not taxed as a corporation. As a result, S corporations may not invoke the protections of the Fifth Amendment. United States v. Mid-West Business Forms, Inc., 474 F.2d 722, 723 (8th Cir. 1973); United States v. Richardson, 469 F.2d 349, 352 (10th Cir. 1972). The privilege does not apply to professional corporations. United States v. Theodore, 479 F.2d 749, 752-53 (4th Cir. 1973).

[39] Dreier v. United States, 221 U.S. 394, 400 (1911).

[40] *Id.* (holding that custodian was "not entitled to refuse the production of the corporate records. By virtue of the fact that they were the documents of the corporation in his custody, and not his private papers, he was under the obligation to produce them when called for by proper process.").

[41] United States v. White, 322 U.S. 694, 701 (1944). A grand jury issued a subpoena addressed to a union requiring the production of certain union records. *Id.* at 695. Based on the subpoena, an assistant supervisor of the union appeared before the grand jury but declined to produce the subpoenaed documents asserting the production might incriminate the union, the assistant supervisor in his official capacity as an officer of the union, or the assistant supervisor in his individual capacity. *Id.* at 696; *see also* Brown v. United States, 276 U.S. 134 (1928).

[42] *White*, 322 U.S. at 699. In so holding the court determined that representatives of a collective group act as agents, "[a]nd the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." *Id.*

[43] *Id.* at 700-01.

Fifth Amendment not only corporate records[44] but also records of a partnership.[45] *Bellis* understood *Wilson* to hold that "corporate records do not contain the requisite element of privacy or confidentiality essential for the [Fifth] [A]mendment privilege to attach."[46] The Supreme Court then extended to partnership records the same considerations that precluded reliance on the Fifth Amendment privilege for corporate records.[47] As such, "no artificial organization may utilize the personal privilege against compulsory self-incrimination."[48] By choosing the designation of an artificial entity, officers cannot claim a personal Fifth Amendment privilege to protect that entity or the documents and records thereof.[49]

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[44] The size of the corporation is irrelevant. See Grant v. United States, 227 U.S. 74, 77 (1913); Fineberg v. United States, 393 F.2d 417, 420 (9th Cir. 1968); Hair Industry, Ltd. v. United States, 340 F.2d 510, 511 (2d Cir. 1965).

[45] Bellis v. United States, 417 U.S. 85, 92, 95-97 (1974). A partner in a small, three person law firm sought to invoke his privilege against self-incrimination to justify his refusal to comply with a subpoena requiring production of financial records of the partnership. *Id.* at 86.

[46] *Id.* at 92.

[47] *Id.* at 101. Since artificial entities can only act through individual agents and officers, the recognition of a Fifth Amendment privilege for books and papers of such an organization would significantly undermine the legitimate governmental regulation of artificial entities. *Id.* at 90; *see* Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549, 566 (1990) (Marshall, J., dissenting) (recognizing "the well-established principle that a collective entity, unlike a natural person, has no Fifth Amendment privilege against self-incrimination"); United States v. Alderson, 646 F.2d 421, 423 (9th Cir. 1981) (holding that Fifth Amendment privilege does not apply to small family partnership); United States v. Greenleaf, 546 F.2d 123, 128 (5th Cir. 1977) (holding that Fifth Amendment privilege does not apply to two person partnership); United States v. Mahady & Mahady, 512 F.2d 521, 524 (3d Cir. 1975) (holding that Fifth Amendment privilege does not apply to small family law partnership). In addition, the Fifth Amendment privilege does not apply to limited partnerships. *See* United States v. Silverstein, 344 F.2d 1016, 1016 (2d Cir.) (per curiam), *cert. denied*, 382 U.S. 828 (1965); Silverstein v. United States, 314 F.2d 789, 791 (2d Cir.), *cert. denied*, 374 U.S. 807 (1963). The Fifth Amendment privilege does not apply to estates. United States v. Hankins, 565 F.2d 1344, 1349 (5th Cir. 1978). The Fifth Amendment privilege also does not apply to trusts. United States v. Kennedy, 122 F. Supp. 2d 1195, 1198 (N.D. Okla. 2000); Zielke v. United States, 194 F.3d 1319, 1319 (9th Cir. 1999); United States v. Skala, 162 F.3d 1171, 1171 (9th Cir. 1998); *In re* Grand Jury Subpoena, 973 F.2d 45, 46-47 (1st Cir. 1992); *In re* Grand Jury Proceedings, 633 F.2d 754, 756 (9th Cir. 1980). The Fifth Amendment privilege against self-incrimination does not apply to family trusts. Watson v. Commissioner, 690 F.2d 429, 430 (5th Cir. 1982); United States v. Kennedy, 122 F. Supp. 2d 1195, 1198 (N.D. Okla. 2000); United States v. Harrison, 653 F.2d 359, 361 (8th Cir. 1981).

[48] *Bellis*, 417 U.S. at 90.

Fifth Amendment

While much of the Fifth Amendment analysis is discussed in connection with the artificial entity doctrine itself, a number of points do not fit squarely in that context. And, since summons enforcement proceedings are subject to the same privileges as judicial proceedings,[50] some further comment is necessary. Rooted in English ecclesiastical courts, the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[51] In 1886, the Supreme Court applied the Fifth Amendment privilege to subpoenas and summons for documents and reversed a lower court's order for the production of invoices.[52] In so doing, the Court noted that it was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[53]

About 100 years later, in *Andresen v. Maryland*, the Supreme Court held that the seizure of business records did not compel a man to be a witness against himself.[54] This case implies that the Fifth Amendment was not violated because he had not been compelled to create the records but had "voluntarily committed them to writing."[55] While this may be so, *Andresen* did not involve records that failed to be maintained, as required by statute; instead, the records were voluntarily created and subject to a subpoena.[56] As a result, I do not believe that the Supreme Court dicta in *Andresen* has any bearing on the Fifth Amendment privilege analysis.[57]

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[49] *See* Alito, *supra* note 33, at 70-71; *see also* United States v. Kordel, 397 U.S. 1 (1970). In addition, the historical rationale for Fifth Amendment protection is not a barrier to otherwise acceptable government intrusion concerning the business of an artificial entity. The Fifth Amendment privilege was necessary to protect religious freedom and freedom of speech and to prohibit physical abuse and torture. Those protections are not necessary for artificial entities as they do not have religious beliefs and cannot be tortured.

[50] Falsone v. United States, 205 F.2d 734, 738 (5th Cir. 1953); *see also* McMann v. Sec. and Exch. Comm'n, 87 F.2d 377, 378 (2d Cir. 1937).

[51] U.S. CONST. AMEND. V. *See* E. CLEARLY, MCCORMICK ON EVIDENCE § 114 (3d ed. 1984); Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[52] Boyd v. United States, 116 U.S. 616, 638 (1886). In order to expedite the construction of a federal courthouse in Philadelphia, Boyd supplied glass on which it had previously paid a duty and replaced its stock with duty-free glass as was permitted for the construction of the courthouse. *Id.* Boyd claimed that a substantial quantity of the first shipment of duty-free glass was broken en route and sought a second shipment of duty-free glass. *Id.* The government obtained a court order for the production of invoices for the first shipment. *Id.* at 618.

[53] *Id.* at 633.

The more compelling argument that the Fifth Amendment privilege could apply to artificial entities came in a case that did not involve an artificial entity and was decided the same year as *Andresen*. In *Fisher v. United States*,[58] the taxpayers obtained documents from their accountants regarding the preparation of their tax returns and subsequently transferred these documents to their attorneys, attempting to cloak the documents in the attorney-client privilege.[59] The Internal Revenue Service issued a summons to the attorneys.[60]

The *Fisher* Court noted that in the context of the Fifth Amendment, the prohibition against self-incrimination is a privilege against personal compulsion; it is not intended to prohibit incrimination of a third party even if that third party is an agent of the accused. The same principle applies to documents transferred to a third party, specifically, one covered by a common law privilege such as between attorney and client.[61] In such a case, an attorney-client relationship contemplates the same privilege that the client possessed prior to a transfer of document to an attorney. Thus, if documents could have been obtained directly from a client if the documents were in his possession, those same documents may be obtained from an attorney following a transfer from the client.[62] Conversely, when a document is privileged if in the hands of a client, it is similarly protected if transferred to an attorney.[63] As a result, "[i]t is the extortion of information from the accused himself that offends our sense of justice."[64]

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[54] 427 U.S. 463, 472-77 (1976).

[55] *Id.* at 473.

[56] *Id.* at 463.

[57] Four years after Andresen, the Supreme Court considered the still open question of whether compelled creation of documents would stand Fifth Amendment scrutiny. *See* United States v. Euge, 444 U.S. 707, 718 n.11 (1980).

[58] 425 U.S. 391 (1976).

[59] *Fisher*, 425 U.S. at 395, 399. While none of these documents were prepared by the taxpayers, information used to prepare the tax returns was taken from the books and records of the taxpayers. *Id.* at 399.

[60] *Id.* at 398.

[61] *Fisher*, 425 U.S. at 397-99.

In *Fisher*, the Court concluded that the Fifth Amendment privilege is limited to compelled testimonial communication and does not apply to the production of incriminating evidence.[65] Notwithstanding the contents of the papers or documents, their production may be sufficiently testimonial in nature to implicate the prohibition of self-incrimination under the Fifth Amendment. In this case, the act of producing documents in compliance with a subpoena or summons may tacitly concede the existence of papers, possession or control by the taxpayer, and the taxpayer's belief that the papers or those described by a subpoena or summons may violate the Fifth Amendment privilege against self-incrimination.[66] The grant of immunity would remedy the Fifth Amendment privilege. However, such a grant of immunity is unnecessary.[67]

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[62] Grant v. United States, 227 U.S. 74, 79-80 (1913); Falsone v. United States, 205 F.2d 734, 739 (5th Cir. 1953).

[63] *Fisher*, 425 U.S. at 404; United States v. Judson, 322 F.2d 460, 466 (9th Cir. 1963); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962).

[64] Couch v. United States, 409 U.S. 322, 328 (1973). The privilege grew from English common law; LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 329-30 (1968); Stephen A. Salzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 7 (1986). Under a broad interpretation, no one should be required to provide evidence against himself. *Id.* More narrowly, the privilege was based on the belief that no one should be required to answer questions, under oath, prior to being formally charged. *Id.*

[65] *Fisher*, 425 U.S. at 401. The Fifth Amendment is not violated by the fact that papers or documents may incriminate the accused on their face, but rather the privilege protects a person only against being incriminated by his own compelled testimonial communications. *Id.* at 409. *See* Gilbert v. California, 388 U.S. 263, 266-67 (1967); Schmerber v. California, 384 U.S. 757, 763-64 (1966); United States v. Wade, 388 U.S. 218, 222-23 (1967); *see also* United States v. Temple, 286 F.3d 1047, 1049-50 (8th Cir. 2002) (stating that where Internal Revenue Service knew that documents existed, that taxpayer possessed them and that documents could be authenticated by handwriting expert, taxpayer's act of production was insufficiently testimonial to violate Fifth Amendment privilege); United States v. Pelto, 941 F.2d 1210, 1211 (6th Cir. 1991) (holding that production did not prove existence or authenticity and was not protected by Fifth Amendment privilege); United States v. Schlansky, 709 F.2d 1079, 1082-83 (6th Cir. 1983) (holding that act of production was not testimonial self-incrimination); H. Bruce Dorsey, Baltimore City Department of Social Services v. Bouknight*: The Required Records Doctrine—Logic and Beyond*, 50 MD. L. REV. 446, 451 (1991). *But see* United States v. Cianciulli, 2001 WL 1097919, *2 (S.D.N.Y. Sept. 19, 2001) (upholding Fifth Amendment where unlikely that Internal Revenue Service knew of documents existence or where such documents were in possession of taxpayer).

While *Fisher* did not contemplate application of the Fifth Amendment to artificial entities, its approach arguably modified the prospect of raising a Fifth Amendment claim in all cases, including those involving artificial entities. The Court limited the Fifth Amendment privilege to compulsory testimony but recognized that the act of production could be the equivalent of testimony and thus protected by the Fifth Amendment to the extent that it concedes the "existence of papers demanded and their possession or control by the taxpayer" or to the extent that it serves to authenticate the documents.[68]

The *Fisher* analysis was mirrored eight years later in *United States v. Doe*.[69] In *United States v. Doe*, a grand jury issued subpoenas for the business records of a number of sole proprietorships.[70] The Supreme Court held that the contents of voluntarily created business records are not protected; however, following *Fisher*, the Court also held that "[a]lthough the contents of a document may not be privileged, the act of producing the document may be."[71] Thus, the Court determined that a sole proprietor's privilege was properly invoked inasmuch as the act of producing documents pursuant to a subpoena was a testimonial communication that met the test under *Fisher*.[72]

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[66] *Fisher*, 425 U.S. at 410 ("The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the paper produced."). In other words, the act of production itself tacitly says two things: (1) "I have the documents" and (2) "These seem to be the documents you want." Alito, *supra* note 33, at 46. It may also say that the documents are authentic. These would appear to be testimonial communications which in theory are protected by the Fifth Amendment. *Fisher*, 425 U.S. at 410.

[67] Nonetheless, a sense of completeness compels a description. Full immunity prohibits the use of any documents while act of production immunity allows unrestricted use of the contents of documents produced but prohibits the testimonial character of the production as developed under *Fisher*. Alito, *supra* note 33, at 56-57.

[68] *Fisher*, 425 U.S. at 409-10. *See* Alito, *supra* note 33, at 43-44.

[69] 465 U.S. 605 (1984).

[70] *Doe*, 465 U.S. at 606.

Collectively, the early cases prior to *Fisher* and *Doe* mandate that a subpoena to an artificial entity for business records cannot be resisted on grounds of the Fifth Amendment. However, the Court provided somewhat inconsistent pronouncements for the rationale that corporate, or better yet, institutional records are not subject to the privilege against self-incrimination. The first explanation is that the policy behind the Fifth Amendment is designed to protect private papers or privacy and, since institutional records did not fall within those parameters, the Fifth Amendment becomes inapplicable. This rationale, adopted at least in part by *Boyd*,[73] *Henkel*,[74] *Wilson*,[75] *Dreier*,[76] *White*[77] and *Bellis*,[78] may not survive the 1976 Supreme Court decision in *Fisher*.[79]

The other rationale is based on the artificial entity doctrine itself—that institutional records are not privileged and that an individual's privilege should not serve as a proxy for otherwise non-privileged records.[80] In such a case, the need for public inspection of institutional records takes precedence over the individual's personal privilege.[81] This explanation is unaffected by *Fisher* and provides greater justification for disclosure of documents and protecting at best the act of production.[82] As a result, no need exists to include artificial entities in those entitled to protection by the Fifth Amendment.[83]

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[71] *Id.* at 610-14.

[72] *Id.* at 613, 617. *See In re* Grand Jury Proceedings, Subpoenas for Documents, 41 F.3d 377, 381 (8th Cir. 1994) (holding that sole proprietors protected by Fifth Amendment privilege from producing business documents).

[73] Boyd v. United States, 116 U.S. 616 (1886).

[74] Hale v. Henkel, 201 U.S. 43 (1906).

[75] Wilson v. United States, 221 U.S. 361 (1911).

[76] Dreier v. United States, 221 U.S. 394 (1911).

[77] United States v. White, 322 U.S. 694 (1944).

[78] Bellis v. United States, 417 U.S. 85 (1974).

[79] Fisher v. United States, 425 U.S. 391 (1976). *See* Alito, *supra* note 33, at 69.

[80] Alito, *supra* note 33, at 69.

[81] *Id.*

Braswell v. United States[84] clarifies that *Fisher* and *Doe* may not be read to eliminate the collective or artificial entity rule or to restrict the scope of the rule by looking to the act of producing the documents. In fact, *Braswell* provides a solid foundation for invoking the use of the artificial entity doctrine with the required records doctrine to improve tax compliance.

In *Braswell*, the Court concluded that Fifth Amendment protection was not available to a one-person corporation where the privilege was exerted on behalf of the corporation.[85] In doing so, the Supreme Court held that the custodian of corporate records may not refuse to comply with a subpoena for the records over which the custodian has custody based on an assertion that the act of production will incriminate the custodian personally in violation of his Fifth Amendment rights.[86] In rolling back the scope of *Fisher* and *Doe*, *Braswell* made it unlikely that the Fifth Amendment is applicable to corporate records.[87] The opinion itself provides support. The Court distinguished *Doe* based simply on the form of corporate existence.[88]

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[82] *Id.*

[83] Moreover, modification of the artificial entity doctrine is unnecessary in light of *Fisher* as the privilege was developed to protect natural persons and not artificial entities. *Id.* The privilege was used in High Commission and ecclesiastical courts to resist confessions of violations of church law. *See* LEVY, *supra* note 64; John A. Kemp, *The Background of the Fifth Amendment in English Law: A Study of its Historical Implications*, 1 WM. & MARY L. REV. 247 (1958); E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 1-23 (1949); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 774 (1935); Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 5-11 (1930).

[84] Braswell v. United States, 487 U.S. 99 (1988). In *Braswell*, a federal grand jury issued a subpoena to the president of each of two corporations requiring production of their books and records. *Id.* at 101. The president moved to quash the subpoena on the ground that the act of production would intrude on his Fifth Amendment privilege against self-incrimination under *Fisher* and *Doe*. *Id.*

[85] *Id.* at 109.

[86] *Id.* It was irrelevant that the subpoena was issued to the president in his capacity as the custodian of the corporate records as was the case here or whether the subpoena was issued to the corporation. *See supra* notes 36-40 and accompanying text.

[87] The Court declined to follow the lead of Curcio v. United States, 354 U.S.

In *Doe*, the Fifth Amendment protected the compelled production of documents of a sole proprietorship while, in *Braswell*, the Fifth Amendment did not preclude the compelled production of documents for an artificial entity that, in effect, is an incorporated sole proprietorship.[89] The only distinction is the form of the entity.[90] This interpretation ensures that the documents will be produced and immunity is not the sole source for ensuring production.[91]

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118 (1957), a case which dismissed the argument of the United States that a custodian of corporate records gives up his Fifth Amendment privilege by assuming the duty as custodian of corporate records. *Id.* at 127-28.

[88] The Supreme Court recognized the potential for individual incrimination in the production of records:

> Although a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating, we do think certain consequences flow from the fact that the custodian's act of production is one in his representative rather than personal capacity. Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Therefore, the Government concedes, as it must, that it may make no evidentiary use of the "individual act" against the individual. For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian. The Government has the right, however, to use the corporation's act of production against the custodian.

Braswell, 487 U.S. at 117-18.

[89] *Id.* at 111 n.5. In distinguishing *Doe*, the Court explained:

> The *Doe* opinion begins by explaining that the question presented for review is "whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the business records of a *sole proprietorship.*" A sole proprietor does not hold records in a representative capacity. Thus, the absence of any discussion of the collective entity rule can in no way be thought a suggestion that the status of the holder of the records is irrelevant.

Id. (emphasis in original) (citation omitted).

[90] *See* John M. Grogan, Jr., *Fifth Amendment—The Act of Production Privilege: The Supreme Court's Portrait of a Dualistic Record Custodian*, 79 J. CRIM. L. & CRIMINOLOGY 701, 706-07 (1988).

[91] *See* Karen E. King & Matthew B. Kilby, *Fifth Amendment at Trial*, 90 GEO. L.J. 1690, 1691 (2002); Keri L. Bowles, *Grand Jury*, 90 GEO. L.J. 1305, 1322-23 (2002); Timothy Barbrow, Braswell v. United States*: Using the Corporate Fiction to Deny an Individual His Fifth Amendment Rights*, 12 GEO. MASON U. L.

In many cases, however, the production of books and records is akin to a compelled physical act with no appreciable

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REV. 405, 413 (1990); *see also* Securities and Exchange Comm'n v. Dunlap, 253 F.3d 768, 775 (4th Cir. 2001) (holding that corporate agent may not invoke Fifth Amendment in response to subpoena for corporate documents); United States v. Insurance Consultants of Knox, Inc., 187 F.3d 755, 759 (7th Cir. 1999) (holding that corporate officers may not invoke Fifth Amendment in response to summons of Internal Revenue Service for corporate documents); Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 674 (5th Cir. 1999) (stating that adverse inference may be drawn against corporation where chief executive officer refuses to testify in personal capacity); United States v. McLaughlin, 126 F.3d 130, 133 (3d Cir. 1997) (noting that custodian of corporate records may not invoke Fifth Amendment in response to subpoena for corporate documents); *In re* Grand Jury Witnesses, 92 F.3d 710, 712-13 (8th Cir. 1996) (same). To further reduce the impact on an individual, summonses may be directed to the entity, instead of a particular officer or employee of the entity, thereby permitting the artificial entity to designate an appropriate agent. Inasmuch as the artificial entity can choose an agent to respond to a summons, it should not be able to circumvent disclosure by selecting an agent who will invoke a personal Fifth Amendment privilege based on an act of production. *See* Sancetta v. United States, 788 F.2d 67, 74 (2d Cir. 1986) (requiring support personnel in one person professional office to search for produced records even though professional protected by personal Fifth Amendment privilege); United States v. Barth, 745 F.2d 184, 189 (2d Cir. 1984) (reasoning that summons could not be enforced against officer personally, because of personal Fifth Amendment privilege, but since corporation not protected by privilege, corporation is compelled to appoint different agent to testify); *see also* United States v. Lang, 792 F.2d 1235, 1240-42 (4th Cir. 1986). Instead, the artificial entity should do necessary acts to comply with the summons. While not required by *Braswell*, if no officer or employee can be designated because of a claim of personal privilege, an agent such as an attorney or accountant may be designated. Absent such a designation, the artificial entity should designate the highest ranking individual to comply with the summons. After all, individuals who conduct their business affairs through an artificial entity and chose to accept the benefits of this designation, should also be prepared to accept the responsibilities associated with that designation. Specifically, that the institutional records of an artificial entity are not privileged, the act of production doctrine should not apply to such records, and the records of an artificial entity should be produced even though such books and records may incriminate an officer personally. This is consistent with *Braswell*. *See* Wilson v. United States, 221 U.S. 361 (1911); United States v. Vallance, 793 F.2d 1003 (9th Cir. 1986); United States v. Troy's Welding Shop, Inc., 1975 WL 3578 (10th Cir. Mar. 19, 1975); United States v. Willson, 436 F.2d 969 (6th Cir. 1971); United States v. Held, 435 F.2d 1361 (6th Cir. 1970); United States v. Bowman, 435 F.2d 467 (3d Cir. 1970); United States v. Christiansen, 356 F.2d 986 (3d Cir. 1966); Wright v. Detwiler, 345 F.2d 1012 (3d Cir. 1965); Hair Industry, Ltd. v. United States, 340 F.2d 510 (2d Cir. 1965); Wild v. Brewer, 329 F.2d 924 (9th Cir. 1964); United States v. Silvio, 317 F. Supp. 1108 (W.D. Mo. 1970); United States v. Kelly, 311 F. Supp. 1216 (E.D. Pa. 1969); United States v. *Crespo*, 281 F. Supp. 928 (D. Md. 1968).

testimonial content.[92] Inasmuch as the Fifth Amendment protects testimonial communication and not a compelled physical act or demonstrative evidence obtained through physical observation, the Fifth Amendment privilege does not extend to providing blood samples,[93] giving a handwriting exemplar,[94] providing a voice exemplar,[95] wearing clothes worn by a perpetrator,[96] appearing in a line-up or speaking certain phrases for identification purposes.[97]

The compelled creation of handwriting exemplars provides an appropriate example. Initially, the Second Circuit and the Sixth Circuit concluded that a taxpayer could not be compelled to "create" a handwriting exemplar not previously in existence pursuant to a summons by the Internal Revenue Service.[98]

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[92] Fisher v. United States, 425 U.S. 391, 411 (1976).

[93] Schmerber v. California, 384 U.S. 757, 765 (1966) ("[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by petitioner, it is not inadmissible on privilege grounds"). *See* United States v. Edmo, 140 F.3d 1289, 1292-93 (9th Cir. 1998) (requiring defendant to provide urine sample); United States v. Dougall, 919 F.2d 932, 935 (5th Cir. 1990) (requiring defendant to supply hair sample); United States v. Maceo, 873 F.2d 1, 5-6 (1st Cir. 1989) (requiring defendant to submit to examination of teeth and gums).

[94] United States v. Mara, 410 U.S. 19 (1973); United States v. Dionisio, 410 U.S. 1 (1973); Gilbert v. California, 388 U.S. 263, 265-67 (1967).

[95] United States v. Wade, 388 U.S. 218, 222-23 (1967).

[96] Holt v. United States, 218 U.S. 245, 252-53 (1910); *see also* Pennsylvania v. Muniz, 496 U.S. 582, 592 (1990) (requiring drunk driver defendant to demonstrate slurred speech and coordination on videotape); Engberg v. Wyoming, 265 F.3d 1109, 1120 (10th Cir. 2001) (requiring defendant to be photographed wearing stocking hat); United States v. Montgomery, 100 F.3d 1404, 1406 (8th Cir. 1996) (requiring witness to try on shirt); United States v. Silvestri, 790 F.2d 186, 189 (1st Cir. 1986) (requiring defendant to stand and identify himself); United States v. Delaplane, 778 F.2d 570, 575 (10th Cir. 1985) (requiring defendant to read from wiretap transcripts).

[97] United States v. Wade, 388 U.S. 218 (1967). *See* Avery v. Procunier, 750 F.2d 444, 448 (5th Cir. 1985) (requiring defendant to re-enact robbery); United States v. Valenzuela, 722 F.2d 1431, 1433 (9th Cir. 1983) (requiring defendant to shave).

[98] United States v. Davey, 543 F.2d 996, 996 (2d Cir. 1976); United States v. Brown, 536 F.2d 117, 122 (6th Cir. 1976). In *Davey*, the taxpayer argued that § 7602 prevented the Internal Revenue Service from compelling him to produce a handwriting exemplar as that section cannot be used to compel a taxpayer to make the auditing task of the Internal Revenue Service easier by preparing or creating documents not in existence. *Davey*, 543 F.2d at 999. In validating the

The Supreme Court in *United States v. Euge*, however, concluded that handwriting exemplars may be compelled under the broad authority of the Internal Revenue Service in issuing a summons.[99] The *Euge* Court states that it expresses "no opinion on the scope of the Service's authority to otherwise order the witness to generate previously nonexistent documentation under § 7602."[100]

While the Court acknowledges no *express* opinion on the subject, footnote eleven of the *Euge* decision indicates the Court's perspective on the scope of the Service's authority.[101] While the Court's view that the exhibition of physical characteristics is not equivalent to the creation of documentary

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taxpayer's argument, the Second Circuit concluded that § 7602 does not require preparation or production of records not yet in existence. *Id.* at 1000. In *Brown*, the Internal Revenue Service, through § 7602, sought to compel the taxpayer to produce a handwriting exemplar. *Brown*, 536 F.2d at 120-21. In refusing to enforce the summons, the Sixth Circuit concluded that § 7602 does not authorize the Internal Revenue Service to direct the manufacture of new documents to facilitate its examination. *Id.* at 121. The Sixth Circuit construed the summons power to encompass only documents, papers, and other writings previously in existence. *Id.* at 122; *see also* United States v. Campbell, 524 F.2d 604 (8th Cir. 1975) in which the Eighth Circuit determined that the term "other data" in § 7602 was broad enough to encompass handwriting exemplars for comparison signatures of potential aliases by a taxpayer. *Id.* at 607. In doing so, the court relied on congressional modification of the predecessor statute to § 7602, specifically § 3614 of the Internal Revenue Code of 1939, which used the term "memoranda," while § 7602 used the terminology "other data." *Id.* The Eight Circuit found significant that § 7602 used broader language than its predecessor, even though the legislative history of § 7602 noted that its enactment contained "no material change from existing law" under § 3614. *Id.* at 606. *But see* United States v. Rosinsky, 547 F.2d 249 (4th Cir. 1977) in which the Fourth Circuit concluded that compelling a taxpayer to create a handwriting exemplar would be consistent with the summons authority of the Internal Revenue Service under § 7602. The Fourth Circuit reasoned that, since a grand jury may compel the creation of a handwriting exemplar, the Internal Revenue Service may compel a handwriting exemplar because the summons power is "essentially the same" as the power of the grand jury. *Id.* at 252-53.

[99] United States v. Euge, 444 U.S. 707, 719 (1980).

[100] *Euge*, 444 U.S. at 717 n.11.

[101] *Id.* In *Euge*, the taxpayer argued that the language of § 7602 suggested that a summons may only require the production of documents already in existence. *Id.* The taxpayer concluded that since handwriting exemplars must be created by the witness, handwriting exemplars are beyond the scope of § 7602 *Id.* Therefore, the argument continued, the statute is inapplicable. *Id.*

evidence,[102] its second point is more revealing. Looking to the language of § 7602, the Court noted that the summons authority not only provides for the production of books, papers, records or other data, but also compels testimony.[103] Therefore, § 7602 "contemplates the transformation of some evidence not formerly tangible, since it obligates the summoned individual to provide testimony."[104] It follows that "testimony . . . creates evidence not previously in existence."[105] Consequently, it makes "no difference between the nature of the evidence created when the witness is ordered to talk and that created when he is ordered to write."[106]

Notwithstanding the open invitation from the Supreme Court over twenty years ago, the Internal Revenue Service abdicated its ability to require taxpayers to create documents pursuant to an administrative summons. The Internal Revenue Manual provides that an administrative summons "should not require the witness to do anything other than to appear on a given date to give testimony and to bring with him/her existing books, papers and records. A witness cannot be required to prepare or create documents."[107] This is presumably based on Fifth Amendment considerations.

The utility of the Fifth Amendment, in a historical context, should dictate its parameters. For example, in earlier times, the Fifth Amendment provided guarantees that citizens held in the highest regard, including religious freedom and freedom of speech, that are now protected by the First Amendment.[108] The Fifth Amendment also once prohibited torture and physical abuse to extract confessions, the prohibition of which is now guaranteed by our notions of due process.[109]

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[102] *Id.* (citing United States v. Dionisio, 410 U.S. 1, 6 (1973)).

[103] *Euge*, 444 U.S. at 717 n.11.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] Internal Revenue Manual § 4022.64(4) (CCH 1977). This section provides, however, that "[t]he giving of handwriting exemplars, at an appearance pursuant to a summons is not creating a document." Id.

[108] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 332 (Oxford University Press 1968).

[109] *Id.* at 326-27. Due process also prohibits the use of psychologically coercive

Instead, the perception today is that the Fifth Amendment serves as no more than a safe harbor to those who violate the norms of society.[110] As a result, as long as the guarantees protected by the First Amendment, Due Process Clause, the Fourth Amendment and the Equal Protection Clause remain, the required records doctrine could be implemented and utilized effectively without treading on the foundations of the privilege against self-incrimination.[111] The privilege against self-incrimination should not make it easier to commit criminal acts.

Required Records

The tax structure in the United States is based on a system of self-reporting which depends significantly on the good-faith of the taxpaying public to disclose information necessary to determine the appropriate amount of tax liability for all taxpayers. "Nonetheless, it would be naïve to ignore the reality that some persons attempt to outwit the system, and tax evaders are not readily identifiable."[112] In fact, the growing tax gap of $200 billion demonstrates the truth of this statement, with approximately eighty percent of the underreporting attributable to businesses. As a result, Congress has established a check on this self-reporting system by providing the IRS the essential tools necessary to ascertain and collect the proper tax liability. The agency should use the full extent of the congressional authorization.

First, under § 6001 of the Internal Revenue Code, a taxpayer is required to maintain certain records to permit the Internal Revenue Service to determine whether a taxpayer properly reported its tax liability for a particular year.[113] The requirement to maintain particular records is implemented

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methods of obtaining confessions. *See* Spano v. New York, 360 U.S. 315 (1959); Brown v. Mississippi, 297 U.S. 278 (1936).

[110] *See* Salzburg, *supra* note 64, at 8.

[111] *See* Bernard D. Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 728 (1951); *see also* Salzburg, *supra* note 64, at 32.

[112] United States v. Bisceglia, 420 U.S. 141, 145 (1975).

[113] 26 U.S.C. § 6001 (1986).

principally through the required records doctrine, a doctrine derived from the same line of cases as the artificial entity doctrine.

While *Wilson v. United States* upheld a subpoena for the production of corporate records over a Fifth Amendment objection by determining that a corporate officer has no privilege as to corporate records,[114] it also provided a foundation for the required records doctrine, opining that records required under regulatory schemes were not privileged.[115] In *Shapiro v. United States*, the Supreme Court squarely addressed the required record issue.[116] The Court concluded that since a wholesaler was required by law to keep the records sought, they were "quasi public records" and not subject to a Fifth Amendment claim.[117] In other words, records required to be kept by the government ceased to be personal records but instead were to be held for the government in a "representative capacity."[118]

Shapiro, however, has not lived without detractors and the most compelling critic was voiced in *Shapiro* itself by

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[114] Wilson v. United States, 221 U.S. 361, 377 (1911). Such a determination is grounded upon the collective entity doctrine or the artificial entity doctrine. Such terms are used interchangeably.

[115] *Id.* at 380. The so-called required records doctrine was applied in a variety of regulatory schemes. *See* United States v. Jones, 72 F. Supp. 48, 49 (S.D. Miss. 1947) (applying required records doctrine to Fair Labor Standards Act); Rogers v. United States, 138 F.2d 992, 996 (6th Cir. 1943) (applying required records doctrine to Agriculture Adjustment Act); United States v. Sherry, 294 Fed. 684, 685-86 (N.D. Ill. 1923) (applying required records doctrine to Harrison Narcotics Act). The Supreme Court reaffirmed its views on the required records doctrine in a case involving gasoline rationing that was subject to the inspection authority of the Office of Price Administration. Davis v. United States, 328 U.S. 582 (1946).

[116] Shapiro v. United States, 335 U.S. 1 (1948). Here, a fruit and produce wholesaler was served with a subpoena to produce records in an investigation for possible violation of the Emergency Price Control Act of 1942. *Shapiro* has never been overruled and was favorably cited by the Supreme Court in *United States v. Batchelder*, 442 U.S. 114, 122 (1979) and *New Jersey v. Portash*, 440 U.S. 450, 457 n.7 (1979).

[117] *Shapiro*, 335 U.S. at 33.

[118] *Id.* at 31; *see* ROBERT S. FINK, TAX FRAUD: AUDITS, INVESTIGATIONS, PROSECUTIONS § 10.04[2] (Matthew Bender 1980); *see also* Beard v. United States, 222 F.2d 84 (2d Cir. 1955) (stating that books and records that a taxpayer is required to keep by the Internal Revenue Code are not privileged).

Justice Frankfurter: "If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions."[119] In its most extreme interpretation, this doctrine could permit the government to make any documents that it chooses exempt from the Fifth Amendment privilege against self-incrimination by merely requiring that those documents be maintained as required by law.[120] A number of scholars who support the required records doctrine, however, do so based on a variation of the same rationale. Specifically, that the regulatory need for such information outweighs the private needs of non-disclosure and that by entering business, a disclosure obligation is assumed.[121] The alternative rationale is the foundation upon which I rely in application of the required records doctrine to tax cases.

Prior to that discussion, however, obstacles remain. *Shapiro*, and ultimately the alternative rationale upon which I rely, must be considered in light of the intervening Supreme Court decisions in *Fisher v. United States* and *United States v. Doe* that collectively hold that the act of production itself, and not the contents of documents, is subject to a claim of privilege under the Fifth Amendment.[122] It is true that the production of documents not in existence or the extrapolation of information from documents previously in existence may be testimonial in nature under the act of production theory and thus, arguably, subject to claim of privilege under the Fifth Amendment. The flaw in this rationale lies in the alternative justification for the required records doctrine itself.

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[119] *Shapiro*, 335 U.S. at 51 (Frankfurter, J., dissenting).

[120] SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:13 (2d ed. 2002).

[121] Alito, *supra* note 33, at 72 n.200. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 142, at 303 (Edward N. Cleary ed. 1972) (noting doctrine justified by "public need for information" for regulatory purposes); EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 165-67 (Charles E. Clark ed., 1963) (noting regulatee assumes disclosure obligation by entering business); JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2259c, at 367 (J. McNaughton rev. ed. 1961) ("Public interest in obtaining the information exceeds private interest opposing disclosure."); E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 36-38 (1949) (asserting that regulatee assumes disclosure obligation by entering business); *see also* Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681, 684-87, 692-93 (1965) (discussing above rationales).

[122] Fisher v. United States, 425 U.S. 391 (1976) and United States v. Doe, 465 U.S. 605 (1984).

The required records doctrine requires the maintenance of records and provides notice that certain types of information and/or documents must be maintained to satisfy the regulatory scheme.[123] The alternative rationale contemplates a balancing test whereby the public need for information is weighed against the private need for non-disclosure. The extension of this rationale is that maintaining required records creates a disclosure obligation and is effectively the cost of doing business in an artificial form. As a result, *Fisher* and *Doe* do not modify the required records doctrine,[124] and as long as there is notice, the Fifth Amendment becomes inapplicable.[125] As such, the required records doctrine "merely recognizes that the government . . . must be given appropriate investigatory powers."[126]

The investigative tools, however, are not without limitation. As an investigative tool, Professor Saltzburg notes a number of factors that should be satisfied—(1) the government has general regulatory authority over the activities to which it seeks to apply the required records doctrine;[127] (2) the required records are rationally related to the purpose for requiring such records;[128] (3) the government specifies the records that are required to be kept and the rules governing this requirement;[129] (4) anyone who engages in the activity subject to the required records doctrine may do so lawfully as long as the rules are followed and the required records are kept;[130] (5) the required records for a specific activity should not be applied retroactively.[131] Subject to these requirements, the required records doctrine is simply a condition of doing business in artificial form.[132]

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[123] The required records exception to the Fifth Amendment does not apply to documents retained for convenience, but to those documents that are required to be kept by a statutory and/or regulatory scheme. *See* Commodity Futures Trading Comm'n v .Collins, 997 F.2d 1230, 1233 (7th Cir. 1993); *see also* Sharon L. Volckhausen, *Tax Return Confidentiality Under the Fifth Amendment and the "Required Records" Doctrine: Commodity Futures Trading Commission v. Collins*, 48 TAX LAW. 923, 934 (1995).

[124] *See In re* Two Grand Jury Subpoenae Duces Tecum dated August 21, 1985, 793 F.2d 69, 73-74 (2d Cir. 1986); *In re* Grand Jury Subpoena Duces Tecum (Underhill), 781 F.2d 64, 65 (6th Cir. 1986); *In re* Grand Jury Subpoenas Duces Tecum (Saxon), 722 F.2d 981, 987 n.5 (2d Cir. 1983); *In re* Doe, 711 F.2d 1187, 1191-92 (2d Cir. 1983); *In re* Grand Jury Proceedings, 601 F.2d 162, 170-71 (5th Cir. 1979). *But see* United States v. Edgerton, 734 F.2d 913, 918 n.4 (2d Cir. 1984) (questioning whether required records rule survived *Doe*); Stephen H. Greenspan, In re Doe*: Required Records and the Fifth Amendment*, 16 CONN. L. REV. 1021 (1984).

[125] Alternatively, a grant of immunity against criminal prosecution could be granted to an individual for the production of required information. This, of course, does not protect the artificial entity which has no claim of Fifth Amendment privilege.

[126] Bernard D. Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 728 (1951).

In light of this analysis, the underpinnings of *Shapiro* provide a basis for application of the required records doctrine to tax cases.[133] The so-called required records in tax cases are found in § 6001. Under this authority, Congress requires taxpayers to retain certain records necessary to enforce the integrity of the tax system. Section 6001 provides in full:

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[127] Salzburg, *supra* note 64, at 24.

[128] *Id.* at 25; *see* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-76 (1980); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[129] Salzburg, *supra* note 64, at 25.

[130] *Id.* at 8; *see* Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

[131] Salzburg, *supra* note 64, at 25.

[132] The required records doctrine must satisfy three purposes:

> [F]irst, the purpose of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents.

Grosso, 390 U.S. at 67; *see also Marchetti*, 390 U.S. at 39; Wayne R. LaFave et al., 3 CRIM. PROC. § 8.12(c) (2d ed. 1984).

[133] In 1953, the Fifth Circuit, without analysis, applied the required records doctrine to a tax case, upholding a subpoena issued to an accountant to produce books and records of a client under investigation by the Internal Revenue Service. Falsone v. United States, 205 F.2d 734, 737-38 (5th Cir. 1953). In 1955, the Fourth Circuit, again with only limited comment, approved of the required records doctrine in a tax case. Relying on *Shapiro*, the Fourth Circuit approved of the trial court's instruction that the jury could consider the refusal of the defendant to surrender his books and records in determining whether he willfully failed to file a tax return, notwithstanding his claim of privilege under the Fifth Amendment. Beard v. United States, 222 F.2d 84, 92-93 (5th Cir. 1955). *See* United States v. Willis, 145 F. Supp. 365 (M.D. Ga. 1955) (compelling production of docu-

> Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title. The only records which an employer shall be required to keep under this section in connection with charged tips shall be charge receipts, records necessary to comply with section 6053(c), and copies of statements furnished by employees under section 6053(a).[134]

The language of § 6001 contains a specific grant of authority by Congress to the Secretary authorizing the prescription of necessary regulations to advance the congressional intent of ensuring compliance with its tax laws. Pursuant to this statutory grant of authority, Treasury Regulation § 1.6001 contains two parts: § 1.6001-1 was promulgated to further the congressional intent concerning required records and § 1.6001-2 was promulgated to mandate the filing of certain tax returns. For purposes of this article, the required records regulation under Treas. Reg. § 1.6001-1, enacted in 1960, is particularly instructive:

> § 1.6001-1 Records.
> (a) [A]ny person subject to tax . . . or any person required to file a return of information with respect to income, shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be

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ments upheld under required records doctrine even when records transferred to attorney). *See* J. Roger Edgar, *Tax Records, The Fifth Amendment, and The "Required Records Doctrine,"* 9 ST. LOUIS UNIV. L.J. 502, 504-06 (1965).

[134] 20 U.S.C. § 6001 (2000).

> shown by such person in any return of such tax or information.
>
> . . .
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> (d) Notice by district director requiring returns statements, or the keeping of records. The district director may require any person, by notice served upon him, to make such returns, render such statements, or keep such specific records as will enable the district director to determine whether or not such person is liable for tax . . . .
>
> (e) Retention of records. The books or records required by this section shall be kept at all times available for inspection by authorized internal revenue officers or employees, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law.[135]

It is this congressional enactment and implementing regulation which provides the Internal Revenue Service with a vague, yet broad authority to enforce the tax laws of the United States. *Newman v. United States* provides the proper scope of the required records doctrine.[136]

In *Newman*, the Internal Revenue Service, pursuant to § 6001, directed the taxpayer to maintain certain records. The Internal Revenue Service demanded these records under authority of § 7602.[137] This appears to mean that if the Internal Revenue Service "does not like the taxpayer's bookkeeping methods or wants the taxpayer to keep a particular kind of record it can simply direct the taxpayer to comply with its demand."[138] It also means that under Treasury Regulation § 6001-1 that records are required to be maintained to "establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information."[139]

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[135] Treas. Reg. § 1.6001-1 (as amended in 1990).

[136] Newman v. United States, 277 F.2d 794 (5th Cir. 1960).

[137] *Id.* at 796, 797. Section 7602(a)(1) provides that the Secretary is authorized "[t]o examine any books, papers, records, or other data which may be relevant or material" to, *inter alia*, ascertain the correctness of a return. 26 U.S.C. § 7602 (2000).

[138] Edgar, *supra* note 133, at 507 n.32.

[139] Treas. Reg. § 1.6001-1 (as amended in 1990).

Taxpayers must therefore maintain the records necessary to substantiate any amounts which contribute to the computation of tax liability for a particular year. Logically, it follows then that a taxpayer seems to have little choice. The taxpayer cannot avoid the use of records to incriminate him by keeping inadequate records nor can the taxpayer simply ignore the demand of the Internal Revenue Service under penalty of § 7203 and/or § 7210.[140]

The Internal Revenue Service, however, has created a substantial internal restriction as it is unwilling to rely on the required records doctrine to require the production of documents that it otherwise deems necessary "to show whether or not such person is liable for tax."[141] In *Clancy v. United States*, the Seventh Circuit relied on the required records doctrine to defeat a claim of Fifth Amendment privilege.[142] In its opposition to a grant of certiorari by the Supreme Court, the United States relied on the required records doctrine fashioned by *Shapiro*: "[S]ince the [books] were subject to inspection by internal revenue agents by statute . . . they are not private books and papers."[143]

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[140] Edgar, *supra* note 133, at 507 n.32. Section 7203 provides:

> Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution . . . .

26 U.S.C. § 7203 (2000).
Section 7210 provides:

> Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under . . . 7602 . . . neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

26 U.S.C. § 7210 (2000).

[141] 26 U.S.C. § 6001(a) (2000).

[142] United States v. Clancy, 276 F.2d 617 (7th Cir. 1960).

[143] Brief for Appellee at 9 n.9, United States v. Clancy, 276 F.2d 617 (7th Cir. 1960).

Upon the granting of certiorari, however, the United States rejected the required records doctrine as a basis for affirming the decision of the Seventh Circuit: "[T]he records . . . were not such private papers as to be clothed with immunity from . . . use against the defendants under the . . . Fifth Amendment[]."[144] As such, the United States is unwilling to rely on the required records doctrine in circumstances where tax records are at issue. Not only is the Internal Revenue Service unwilling to rely on the required records doctrine to obtain records that are in existence that are required to be maintained by statute[145] but also for those records that should have been maintained under § 6001.[146] The required records doctrine should be used in both instances.

The required records doctrine is useful, most notably in times where the integrity of the tax system is questioned. Section 6001 and its implementing regulations provide taxpayers with notice that documents must be maintained to determine the correct tax liability of a taxpayer. While the documentation is not specific, this does not mean that notice has not been provided. The most reliable source for determining the tax liability of a taxpayer is the taxpayer, and the Internal Revenue Service has the duty to ensure that the reported tax liability is indeed accurate. The required records doctrine provides the means to accomplish the end.

While I do not suggest that the Internal Revenue Service should not provide specific examples of records that are required to be maintained such as it has done in the area of tax shelters, it nonetheless does not relieve a taxpayer of the obligation to substantiate the reported tax liability based on the generalized requirements under § 6001. Our tax system, as currently constituted, dictates that in most cases, the Internal Revenue Service is not proactive, but is reactive to the sophistication of tax practitioners and by its own limited resources. Consider the area of tax shelters. The Internal Revenue Service drafted tax shelter regulations only after the proliferation of abusive tax shelter schemes like BOSS and Son of BOSS described earlier.[147]

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[144] *Clancy*, 276 F.2d at 630. *See* Department of Justice, Tax Division Manual for Criminal Tax Trials at 103; ROBERT S. FINK, TAX FRAUD—AUDITS, INVESTIGATIONS, PROSECUTIONS, PROSECUTIONS § 10.04[1] (Matthew Bender 1980); Edgar, *supra* note 135, at 507 n.33. The Supreme Court never reached the required records issue. United States v. Clancy, 365 U.S. 312 (1961).

[145] *See Clancy*, 276 F.2d at 617.

[146] Internal Revenue Manual § 4022.64(4) (CCH 1977).

While the Internal Revenue Service can attempt to further enforce the tax laws of the United States through regulations similar to those drafted in tax shelter litigation, the basic investigative tool of the Internal Revenue Service remains its summons authority. This summons authority authorizes the Internal Revenue Service to examine books and records and to summon persons to produce books, paper, records or other data and to give sworn testimony in connection with, among other things, ascertaining the correctness of any return, making a return where none has been made and determining the liability of any person for any internal revenue tax.[148]

This broad authority encompasses the ability to obtain books and records that are required to be maintained under § 6001 and its implementing regulations. Such information can help Internal Revenue agents in obtaining necessary information to evaluate any particular transaction concerning a potential liability. Not incidentally, this may serve to "discourage taxpayer investment in particularly questionable transactions."[149]

When the required records doctrine is merged with the artificial entity doctrine, the Internal Revenue Service has a solid base upon which it may obtain the necessary disclosures to carry out its tax enforcement function. As *Braswell* intimates, a custodian may not shield himself behind the Fifth Amendment to protect corporate records. By assuming the form of a collective or artificial entity, the entity and, ultimately, those responsible for its books and records, assume obligations associated with forming an artificial entity. One of the obligations is that the documents must be produced pursuant to a summons or subpoena.[150] In this case, the act of production is the act of the collective entity not the act of the individual who is responsible for the records. As a result, no Fifth Amendment privilege attaches. *United States v. Hubbell* states so much: "the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement . . . does not clothe such required conduct with the testimonial privilege."[151]

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[147] *See supra* notes 2, 3.

[148] 26 U.S.C. § 7602 (2000).

[149] Ronald A. Pearlman, *Demystifying Disclosure: First Steps*, 55 TAX L. REV. 289, 294 (2002).

By assuming an existence as a collective entity, an entity assumes obligations and responsibilities associated with the privilege of doing business as a form other than a sole proprietorship. This includes maintaining those documents which are required to form the separate existence of an entity and producing them without claim of privilege under the Fifth Amendment. However, the records required to be kept and maintained by taxpayers would likely be unattainable by the Internal Revenue Service absent its summons authority under § 7602.[152]

Summons

Under §7601, the Secretary of the Treasury is provided a broad mandate to audit and investigate persons "who may be liable to pay any internal revenue tax."[153] Section 7602 is the method by which the purposes of §7601 are accomplished.

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[150] Braswell v. United States, 487 U.S. 99, 102 (1988). In *United States v. Hubbell*, 530 U.S. 27 (2000), an Arkansas grand jury issued a subpoena to obtain records from Hubbell under a grant of immunity. A grand jury in the District of Columbia indicted Hubbell. *Hubbell*, 530 U.S. at 30-31. Inasmuch as the United States was unable to demonstrate that information from the Arkansas grand jury was not used to obtain the indictment in the District of Columbia, use of those documents and the information obtained from those documents was protected under the Fifth Amendment. *See* Anthony A. Joseph & William D. Jones, III, *A Grand Jury Primer for Corporate Representation*, 63 ALA. LAW. 227 (2002). Inasmuch as the utilization of the Fifth Amendment in *Hubbell* was predicated on the grant of immunity regarding information provided to the Arkansas grand jury and not the claim of Fifth Amendment protection absent a grant of immunity, *Hubbell* does not impact the analysis and conclusion drawn from *Braswell* that a custodian is not entitled to protection under the Fifth Amendment when operating an artificial entity.

[151] *Hubbell*, 530 U.S. at 35. *See In re* Grand Jury Subpoena, 21 F.3d 226, 230 (8th Cir. 1994) (holding Fifth Amendment does not preclude production of incriminating tax records).

[152] If records are required to be maintained, there is no privilege against self-incrimination concerning those records. If the privilege applied, there would be no recourse for the failure to keep such records and for failure to produce them. *See* Salzburg, *supra* note 64, at 31. Simply because records are not required to be maintained under the required records doctrine does not mean that documents outside the scope of the required records cannot be summoned.

Under § 7602 of the Internal Revenue Code, the Secretary of the Treasury is authorized, among other things, to ascertain the correctness of any return, to make a return where none has been made, to determine the liability for any internal revenue tax, to collect any internal revenue liability and to inquire into any offense connected with the administration or enforcement of the internal revenue laws.[154]

While the Secretary of the Treasury is designed by Congress to administer and enforce the internal revenue laws, the Internal Revenue Service is organized to carry out those broad responsibilities.[155] And, while our tax system, of course, is largely reliant on self-reporting, Congress supplements accurate reporting by the authority provided to the Internal Revenue Service under § 7601 "to proceed . . . and inquire after and concerning all persons . . . who may be liable to pay any internal revenue tax."[156]

This investigatory authority "to proceed . . . and inquire after" is implemented by providing the Secretary with the ability to examine books and records, to summon persons to produce books, paper, records or other data and to give sworn testimony in connection with the authorized purposes listed above.[157] In interpreting this grant of authority, the Supreme Court has construed congressional intent to require the "effective performance of congressionally imposed responsibilities to enforce the tax Code, [and] that authority should be upheld absent express statutory prohibition or substantial countervailing policies."[158] Beginning in 1911, the Court noted the expansive nature of the summons authority, holding that the summons authority "embrace[s] all appropriate measures for its enforcement, [unless] there is . . . substantial reason for assigning . . . a narrower interpretation."[159]

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[153] 26 U.S.C. § 7601(a) (2000). This section provides in full:

> (A) GENERAL RULE.—The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

Id.

[154] 26 U.S.C. § 7602(a)-(b) (2000). Responsibility for administration and enforcement of the revenue laws is vested in the Secretary of the Treasury. 26 U.S.C. § 7801(a) (2000).

[155] The Internal Revenue Service is organized to carry out those responsibilities for the Secretary. *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 308 (1978); Donaldson v. United States, 400 U.S. 517, 534 (1971).

[156] 26 U.S.C. § 7601(a) (2000). As noted by the Supreme Court in *Donaldson v. United States*, 400 U.S. 517, 523 (1971), "[§ 7601] flatly imposes upon the Secretary the duty to canvass and to inquire." Section 7601 and its duty "to canvass and inquire" has its roots in section 3172 of the Revised Statutes of 1874 and the Tariff Act of October 3, 1913, § II, ¶ I, 38 Stat. 178. *Donaldson*, 400 U.S. at 523-24.

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[157] 26 U.S.C. § 7602(a)-(b). These sections provide in full:

> (a) Authority to Summon, Etc. — For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.
>
> (b) Purpose May Include Inquiry Into Offense.—The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

Id.

[158] United States v. Euge, 444 U.S. 707, 711 (1980).

[159] United States v. Chamberlin, 219 U.S. 250, 269 (1911). *See Euge*, 444 U.S. at 715-16 ("formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the Service if [such] authority is necessary for the effective enforcement of the revenue laws and is not undercut by contrary legislative purposes"); United States v. Bisceglia, 420 U.S. 141, 150 (1975) (Court should avoid a construction that prevents the Internal Revenue Service from con-

The legislative history of § 7602 is derived from §§ 3614 and 3615 of the Internal Revenue Code of 1939, which merely codified existing law.[160] The summons authority was carried forward in the Internal Revenue Code of 1954 as § 7602, and its legislative history suggests that Congress intended "no material change from existing law" as part of the Internal Revenue Code of 1954.[161] As such, it is necessary to examine the provisions enacted prior to 1939 to assist in understanding the scope of the summons authority of the Secretary.

The Internal Revenue Service, through the Commissioner, was first given the power to compel the attendance of witnesses, take testimony and examine records in 1919 to determine the liability of a taxpayer.[162] The authority to summon a per-

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ducting a "meaningful investigation . . . absent unambiguous directions from Congress"); *Donaldson*, 400 U.S. at 536 (Court refused to draw the line with respect to summons authority that would "stultify enforcement of federal law"); United States v. Powell, 379 U.S. 48, 53-54 (1964) ("[a]lthough a more stringent interpretation is possible . . . we reject such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted.").

[160] The Internal Revenue Code of 1939 did not substantively change existing law but was merely to codify existing law. S. REP. NO. 20, 76th Cong., 1st Sess. 1 (1939).

[161] H.R. REP. NO. 83-1337 (1954); S. REP. NO. 83-1622 (1954). While the legislative history noted "no material change from existing law," the predecessor statute was section 3614 of the Internal Revenue Code of 1939. Section 3614 utilized the term "memoranda" while section 7602 utilized the term "other data" in its stead. Therefore, it can be plausibly argued that while the legislative history suggests that no material change was intended, the words of the statute fail to communicate that intention and that the phrase "other data" is more broad in interpretation than "memoranda" and thus § 7602 is more expansive that its predecessor. *See* United States v. Campbell, 524 F.2d 604, 606-07 (8th Cir. 1975).

[162] There appears to be no legislative history that sheds any light on the meaning of the provision enacted in 1919. This provision was reenacted in the Act of November 23, 1921, ch. 136, 42 Stat. 227, 310, § 1308; Act of June 2, 1924, ch. 234, 43 Stat. 253, 340, § 1004; Act of February 26, 1926, ch. 27, 44 Stat. (Part 2) 9, 113, § 1104; Act of May 29, 1928, ch. 852, 45 Stat. 791, 878, § 618. It was codified in § 3614(a) of the Code of 1939 which provided in part:

> To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return, or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the

son for purposes of collecting a tax liability can be traced to 1864.[163] Finally, it is possible that § 3654(a) of the Code of 1939 was carried forward to § 7602, which more broadly relates to the general power of the Commissioner.[164]

From enactment in the 1800s, through codification in 1939 and 1954 and through today without substantive change, Congress authorized the use of the summons authority to compel

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> return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

26 U.S.C. § 3614(a) (1940).

[163] Act of June 30, 1864, ch. 173, 13 Stat. 223, 226, § 14. Similar to the summons authority to determine liability, no legislative history appears to exist interpreting this Act. This provision was reenacted in Act of July 13, 1866, ch. 184, 14 Stat. 98, 101, Section 9; Act of December 24, 1872, ch. 13, 17 Stat. 401, Section 1. In 1873 the provision was codified as part of Section 3173 of the Revised Statutes, which section was amended by Act of March 1, 1879, ch. 125, 20 Stat. 327, 330-331, Section 3; Act of August 27, 1894, ch. 16, 28 Stat. 509 557-559, Section 34; Act of October 3, 1913, ch. 16, 38 Stat. 114, 177-179; Subsec. I; Act of September 8, 1916, ch. 463, 39 Stat. 756, 773-774, Section 16; Act of February 24, 1919, ch. 18, 40 Stat. 1057, 1146-1147, Section 1317; Act of November 23, 1921, ch. 136, 42 Stat. 227, 311-312, Section 1311; Act of June 2, 1924, ch. 234, 43 Stat. 253, 344-346, Section 1018; Act of February 26, 1926, ch. 27, 44 Stat. (Part 2) 9, 117-118, Section 1115. This was codified in § 3615 of the Code of 1939 which provided:

> (a) General authority. It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof.

26 U.S.C. § 3615 (1940).

[164] This section was first enacted in 1868 in the Act of July 20, 1868, ch. 186, 15 Stat. 125, 144, § 49 and codified as part of section 3163 of the Revised Statutes of 1874. Section 3654 of the Code of 1939 provided:

> (a) Collectors.—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615.

26 U.S.C. § 3654(a) (1940).

an appearance, require testimony of any person who could assist in an investigation and compel production of books and records.[165] This broad authority is illustrated by § 3654 of the Code of 1939, which granted tax collectors the authority to issue summonses for any purpose relating to their duties to ensure that the internal revenue laws are "faithfully executed and complied with."[166] This 1939 provision supports a reading of § 7602 as complimenting the duty delegated to the Internal Revenue Service under § 7601 "to canvass and to inquire." Consistent with this history, § 7602 should be broadly interpreted to permit the Commissioner to discharge his duties under § 7601 to the full extent permitted by the Constitution.[167]

The proximity of § 7601 and § 7602 is reflexive of the close relationship between the two provisions.[168] Thus, the issuance of a summons under § 7602 is one method through which the Internal Revenue Service can discharge its broad obligation under § 7601 "to inquire after . . . all persons . . . who may be liable to pay any internal revenue tax."[169]

Significantly, nothing in § 7601 suggests that the Internal Revenue Service is restricted in its ability to require persons to make any disclosure except those protected by privilege. The legislative history and the case law interpreting it support the proposition that the Internal Revenue Service is authorized to compel such disclosure. Section 7601 mandates that the Internal Revenue Service use all permissible means to discharge its duty to determine the correct amount of internal revenue taxes.

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[165] Congress intended that the powers conferred under §§ 3614 and 3615 were to extend to all persons, including the taxpayer, who had information and/or records that may assist the Commissioner in determining the correct tax liability of a taxpayer. John Potts Barnes, *Inquisitorial Powers of the Federal Government Relating to Taxes*, 28 TAXES 1211, 1214 (1950).

[166] 26 U.S.C. § 654(a) (1940).

[167] Courts have construed the predecessor provisions liberally. Barnes, *supra* note 165, at 1214. *See In re* Int'l Corp. Co., 5 F. Supp. 608, 611-12 (S.D.N.Y. 1934) (agent had the power to obtain all information bearing on the liability of the taxpayer).

[168] *See* Donaldson v. United States, 400 U.S. 517, 523-24 (1971); *see also* Tillotson v. Boughner, 333 F.2d 515 (7th Cir. 1964); DeMasters v. Arend, 313 F.2d 79, 86-87 (9th Cir. 1963).

[169] In *Holifield v. United States*, 909 F.2d 201, 205 (7th Cir. 1990), the Seventh Circuit described the sentiment of the Supreme Court, "[Section] 7602 [is] the 'centerpiece' of a much larger congressional design to endow the IRS with expansive authority to conduct effective tax investigations." *See* United States v. Arthur Young & Co., 465 U.S. 805, 813-15 (1984).

A summons is a tool specifically authorized by Congress to assist the Service in discharging its duty under § 7601. There does not appear to be a reason why this tool should be limited beyond the constraints imposed by the Constitution. Since no Fifth Amendment prohibition exists concerning artificial entities, the Internal Revenue Service should utilize this summons tool to obtain those records required to be maintained under the required records doctrine, whether or not such records exist.

The structure of § 7602 also lends support to the interpretation advanced here. While § 7602(a)(1) provides that the Secretary is authorized "[t]o examine any books, papers, records, or other data which may be relevant or material" to ascertain the correctness of a return, the permissible uses of a summons under § 7602(a)(2) and (a)(3) shed light on the vast scope of the summons power.[170]

Under § 7602(a)(2), the Secretary may summon "any . . . person the Secretary may deem proper, to appear before the Secretary . . . to give testimony, under oath, as may be relevant or material" to ascertain the correctness of a return.[171] In addition, the Secretary, under § 7602(a)(3), may take testimony of the person under investigation "as may be relevant or material" to, *inter alia*, ascertain the correctness of a return.[172] The authorization to compel the production of books and records, combined with the authorization to compel testimony indicates the intent of Congress to dictate an expansive meaning of § 7602.

In this instance, the power to compel an appearance and provide testimony would be virtually meaningless if the witness could not be required to provide any evidence not otherwise protected by the Constitution or any privilege recognized by common law.[173] Since a witness could be required to provide testimony about matters not committed to writing, it should follow that compelling the creation of items not presently in existence does not stretch the summons power beyond compelling testimony under circumstances in which the records were otherwise required to be maintained.

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[170] 26 U.S.C. § 7601(a)(1) and (2) (2000).

[171] 26 U.S.C. § 7602(a)(2) (2000).

[172] 26 U.S.C. § 7602(a)(3) (2000).

[173] Only privileges recognized by federal law may be applied in summons en-

In other words, § 7602, by its express language, compels a witness to provide testimony that is not otherwise protected. Similarly, the Internal Revenue Service can also compel the creation of documents not previously in existence subject to the same constitutional and common law prohibitions. The summons power authorizes the Secretary to compel summoned persons "to give testimony, under oath, as may be relevant or material," which encompasses the production of information or, perhaps, more significantly, an explanation in response to specific questions posed by the Internal Revenue Service even though such information or explanation has not previously been reduced to writing as long as it bears on the correctness of a return. The creation of a document provides the Internal Revenue Service with the same information as an oral response and no more.

I do concede, however, that nothing in § 7602 expressly authorizes the Internal Revenue Service to utilize its summons power to compel a person to create documents not previously in existence. However, Congress provides some authority to require taxpayers to create certain documents. For example, § 6107 requires return preparers to maintain a list of taxpayers for whom they prepared tax returns.[174] More recently, the tax shelter regulations under Treas. Reg. § 1.6011-4, Treas. Reg. § 301.6111-2 and Treas. Reg. § 301.6112-1 require documentation and disclosure of certain reportable transactions, registration of certain tax shelter promoters and the maintenance of lists by promoters of taxpayers to whom they have offered such shelters.[175]

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forcement proceedings. United States v. Zolin, 491 U.S. 554, 562 (1989). State law created privileges cannot be invoked. Couch v. United States, 409 U.S. 322, 335 (1973).

[174] 26 U.S.C. § 6107 (2000).

[175] Generally, the regulations under § 6011 are directed at the disclosure of

In many cases, abusive tax shelters, while providing little or no hope they will be upheld by a court, are insulated by tax shelter opinions that provide a "reasonable basis" that a court will determine that a tax shelter has economic validity and will be upheld against challenge by the government.[176] The result is that there is also little hope that criminal sanctions will be imposed as a result of the reliance on tax shelter opinions.[177]

In light of the history of §§ 7601 and 7602, I believe that the better argument is that the Internal Revenue Service may require the creation of documents absent violation of the Constitution or common law privilege. Here, I simply argue that when the required records doctrine, in this case under § 6001, is combined with the artificial entity doctrine, the Internal Revenue Service is entitled to such information as to assist the Secretary in determining the correct liability of a taxpayer.

Section 6001 requires the maintenance of documents necessary to, in effect, substantiate the items listed on the tax return. Inasmuch as the Fifth Amendment is designed to protect natural persons, it is inapplicable to artificial entities who wish to conduct business in an entity form. The Code, in § 6107 and the regulations concerning tax shelters, merely provide advance notice to a taxpayer of the specific types of documents that they must maintain. Based on experience, these types of documents proved necessary for the Internal Revenue Service to carry out its statutorily mandated duty to canvass and inquire. Simply, it put taxpayers on notice as to what is required. Absent § 6107 and the tax shelter regulations, the Internal Revenue Service could have required taxpayers to produce such books, records and documents pursuant to § 7602.

The enactment of the tax shelter regulations provides an

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potentially abusive tax shelter transactions and require disclosure of six, specifically "reportable transactions." The regulations under § 6111 require tax shelter promoters to register with the Internal Revenue Service while the regulations under § 6112 require tax professionals to maintain a list of potential clients to which tax-related advice was given for a substantial fee concerning reportable transactions. 26 U.S.C. §§ 6011, 6111, 6112 (2000).

[176] *See* Michael J. Graetz & Louis L. Wilde, *The Economics of Tax Compliance: Fact and Fantasy*, 38 NAT'L TAX J. 355, 358 (1985).

[177] *Id.* at 355.

excellent example of the expansive use of the investigative powers of the Internal Revenue Service. In the summons context, a summons may be used for a dual purpose. In investigating a tax shelter promoter, the Internal Revenue Service will likely require a record of client transactions to determine the tax liability of the promoter. A by-product of this request, however, is that the Internal Revenue Service will obtain information for future audits of the clients of the tax shelter promoter. In this circumstance, the second purpose of a summons—to obtain the identity of the clients of the promoter—is insufficient grounds to quash the summons, assuming that the Internal Revenue Service had a legitimate purpose for requesting the summoned material in the first place.[178]

Thus, as long as the summons seeks information from a promoter that is relevant to the determination of the tax liability of the promoter, it can also be used to determine the correct tax liabilities of unknown taxpayers resulting from the information received from the promoter.[179] A John Doe summons, however, is not the only answer.[180] In addition to the use of a

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[178] United States v. Critelli, 572 F. Supp. 349, 351-53 (W.D.N.Y. 1983). *See* John D. Perovich, Annotation, *What Constitute "Other Data" Which May Be Examined or Summoned Under § 7602(1, 2) of the Internal Revenue Code of 1954 (26 U.S.C.A. § 7602(1, 2)),* 30 A.L.R. FED. 696 (1976).

[179] United States v. Blackman, 72 F.3d 1418, 1423 (9th Cir. 1995); United States v. Sepenuk, 864 F. Supp. 1002, 1004-05 (D. Or. 1994).

[180] In most circumstances, a "John Doe" summons issued by the Internal Revenue Service provides relevant information by directing a summons to "a third party to surrender information concerning taxpayers whose identity is currently unknown to the IRS." *In re* Tax Liabilities of John Does, 671 F.2d 977, 978 (6th Cir. 1982). In such a circumstance, the Internal Revenue Service must demonstrate, in addition to the traditional standards required for enforcement, that it satisfies the specific requirements of 26 U.S.C. § 7609(f). This section provides:

> (f) Additional requirement in the case of a John Doe summons.—Any summons . . . which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—
> (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
> (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
> (3) the information sought to be obtained from the examination of the re-

John Doe summons to directly obtain the identities of the clients of tax shelter promoters,[181] the strategic use of the summons authority directly against tax shelter promoters is yet another way in which the Internal Revenue Service can become more efficient in obtaining relevant information concerning unknown taxpayers.[182] Eliminating tax shelters is generally perceived to be a substantive law problem. However, I believe that tax shelters are an enforcement problem.[183] While Congress may enact legislation to combat tax shelters, greater enforcement powers are necessary to implement tax shelter legislation. Tax shelters, along with less aggressive tax schemes that are the focus of this article, require an enforcement solution.

While regulations now require promoters to provide lists identifying taxpayers who have invested in various tax shelters, these regulations are the result of experience and put promoters on notice of what is required of them. Absent such regulations, documents could have been required pursuant to a summons by the Internal Revenue Service, assuming the summons does not violate the Constitution or privilege. The requirement to maintain a document and the request to create a document to verify the correctness of a return are identical except that one provides advance notice and the other is based on the need by the Internal Revenue Service to assist in deter-

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> cords or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

26 U.S.C. § 7609(f) (2000).

[181] It appears that under the tax shelter regulations, "promoters have registered 1,268 corporate tax shelters since September 2000 and that taxpayers have filed 144 tax shelter disclosure statements." Pearlman, *supra* note 149, at 297-98, *citing* John E. Hembera, Jr., *Corporate Tax Shelter Scrutiny Continues, IRS Official Says*, TAX NOTES TODAY, Sept. 27, 2001 at 188-8 & Bryant Goldwyn, *Tax Shelters: IRS Tax Shelter Office Pursuing Promoters, Enforcing Registration and Disclosure Rules,* DAILY TAX REP. (BNA), Sept. 25, 2001 at G4.

[182] Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 324 (1985) (prior judicial approval for John Doe summons not required when issued for dual purpose of investigating party to whom summons is directed). *See* United States v. Balanced Fin. Mgmt., Inc., 769 F.2d 1440, 1448-49 (10th Cir. 1985); *Critelli*, 572 F. Supp. at 352.

[183] *See* Pearlman, *supra* note 149, at 292.

mining the correct tax liability of a taxpayer or any other legitimate purpose outlined in § 7602(a).

While there is no magic in advance notice to tax shelter promoters, it may prove a more efficient process. However, efficiency is not the measuring stick as to whether a document to assist the Internal Revenue Service in investigating a tax liability may be required. The summons is a custom-made version of advance notice that allows the Internal Revenue Service to specifically tailor its request to the taxpayer under investigation whereas the advanced notice records are those which can be covered with broad brush strokes applying to all taxpayers.

The purpose of § 7602 is to enable the Internal Revenue Service to compel production of those items that a taxpayer or other summoned person is not willing to produce voluntarily. Section 6001 requires a taxpayer to maintain certain documents. The required records doctrine should not be enforced differently based strictly on the willingness of a taxpayer to voluntarily produce documents. The result is that they should not be treated differently.

In general terms, the Internal Revenue Code mandates taxpayers to make and file a tax return.[184] This is the self-reporting nature of taxation in the United States. A second duty follows, however, which detracts from the pure meaning of a self-reporting and assessment system—that in order to ensure the accuracy of the return, a taxpayer shall "keep such records" as prescribed by the Secretary, that such records must substantiate the validity of the return and that they be available for inspection by the Secretary.[185]

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[184] 26 U.S.C. § 6012(a)(1) (2000).

[185] 26 U.S.C. § 6001 (2000); Treas. Reg. § 1.6001-1. While the United States' system of taxation relies on self-assessment, good faith, and integrity of taxpayers to disclose completely and honestly all information relevant to their tax liability, "it would be naïve to ignore the reality that some persons attempt to outwit the system." United States v. Bisceglia, 420 U.S. 141, 145 (1975).

In addition, the Internal Revenue Service, under authority of § 7609 can administratively issue a summons to a third party such as customers, suppliers, and banks. 27 U.S.C. § 7609 (2000). Generally, 26 U.S.C. § 7609 permits the Internal Revenue Service to issue a summons to a third-party recordkeeper requesting the production of records pertaining to a person other than the recordkeeper. *Id.* A third party recordkeeper includes banks and other financial

In less complex cases, the Internal Revenue Service has access to all of the information that it requires to determine the correctness of a return through information matching. In some cases, the Internal Revenue Service obtains the relevant information through cooperation by the taxpayer. Absent such cooperation, the summons is the investigative tool of choice, and this tool is very broad indeed. The use of a summons in a criminal investigation demonstrates its scope.

The Federal Rules of Criminal Procedure are restrictive with respect to use of discovery. Rule 16 speaks of the disclosure of evidence by the government or by the defendant while Rule 16(a)(2) specifically provides that except as provided in Rule 16(a)(1)(A), (B) or (D), "this rule does not authorize the discovery . . . of statements made by [government witnesses or] prospective government witnesses except as provided in 18 U.S.C. § 3500."[186]

Federal Rule of Criminal Procedure 15 refers to deposition testimony, but it "does not authorize [the] use [of depositions] as a means of discovery."[187] Moreover, Rule 15 is only to be used where "it appears that (a) the prospective witness will be unable to attend or be prevented from attending the trial, (b) the prospective witness' testimony is material, and (c) the prospective witness' testimony is necessary to prevent a failure of

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institutions, consumer reporting agencies, brokers, attorneys, accountants, barter exchanges, regulated investment companies and credit card companies. 26 U.S.C. § 7603(b) (2000). In such a case, the Internal Revenue Service is required to provide notice to the taxpayer, and the taxpayer acquires certain procedural rights including the right to bring an action to quash the summons. 26 U.S.C. § 7609(b)(2) (2000). A timely filed petition to quash the summons prevents the Internal Revenue Service from reviewing the documents sought by the summons during the pendency of the petition to quash. 26 U.S.C. § 7609(d)(2) (2000). Significantly, the fact that the taxpayer can or will be incriminated by the production of books or records by a third party is irrelevant. Borris I. Bittker, *Federal Income Tax Returns–Confidentiality vs. Public Disclosure*, 20 WASHBURN L.J. 479, 489 (1980).

[186] FED. R. CRIM. P. 16(a). 18 U.S.C. § 3500 provides that "[i]n any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified in the trial of the case." 18 U.S.C. § 3500 (2000).

[187] *See* United States v. Steele, 685 F.2d 793, 809 (3d Cir. 1982).

justice."[188] Further, Rule 15 provides that a deposition may only be taken upon order of the court after a motion on notice to the parties.

In addition, there is no provision of the Federal Rules which allows discovery of third parties in a criminal proceeding:

> [T]raditionally, the narrow scope of discovery in criminal litigation is justified by three considerations which are said to be peculiar to criminal law. First, there has been a fear that broad disclosure of the essentials of the prosecution's case would result in perjury and manufactured evidence. Second, it is supposed that revealing the identity of confidential government informants would create the opportunity for intimidation of prospective witnesses and would discourage the giving of information to the government. Finally, it is argued that since the self-incrimination privilege would effectively block any attempts to discover from the defendant, he would retain the opportunity to surprise the prosecution whereas the state would be unable to obtain additional facts. This procedural advantage over the prosecution is thought to be undesirable in light of the defendant's existing advantages. The validity of each of these objections must be appraised in each of the situations in which the defendant may seek discovery and must be weighted against the importance to the defendant of the disclosure.[189]

In a criminal investigation by the Internal Revenue Service, however, the summons power is effectively a discovery tool that is expressly sanctioned by Congress. This had not always been the case. Initially, according to the Supreme Court, the Internal Revenue Service could not issue a summons to obtain evidence for use in a criminal proceeding.[190] As a result, prior to 1982, the Internal Revenue Service could not issue a summons in pursuit of a criminal investigation. In 1982, Congress enacted § 7602(b) of the Internal Revenue Code to permit the use of the summons authority by the Internal Revenue Service in criminal investigations.[191]

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[188] H.R. REP. NO. 94-247, at 10 (1975).

[189] Developments in the Law—Discovery, 74 HARV. L. REV. 942, 1052 (1961).

[190] Reisman v. Caplin, 375 U.S. 440, 449 (1964). In *Reisman*, the Internal Revenue Service issued a summons to the accountants of the taxpayers. *Reisman*, 375 U.S. at 510-11. In dictum, the Court noted that several "appropriate" grounds existed to support a challenge to the enforcement of a summons and that one such ground is "that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." *Id. See* United States v. LaSalle Nat'l

The distinction between the Federal Rules of Criminal Procedure and § 7602(b) of the Internal Revenue Code is that a summons is not an adjudication but an investigation and subsequent proceedings may result in criminal liability. The investigative stage in a criminal case is, therefore, treated no differently from the permissible limits of investigation by the Internal Revenue Service into the correctness of a return.

While the scope of the summons authority empowers the Commissioner "to examine any books, papers, records, or other data which may be relevant or material" in "determining the tax liability of any person," it also allows the Internal Revenue Service to issue administrative summonses requiring a taxpayer and third persons "to produce [any relevant or material] books, papers, records, or other data."[192] Moreover, this investigative authority is not limited to situations in which probable cause exists that a violation of the internal revenue laws took place or that a taxpayer failed to report the proper amount of tax liability.[193] Instead, the question is whether the investigative authority may shed light on the correctness of a tax liability or a violation of the tax laws took place.[194]

Bank, 437 U.S. 298, 317 (1978) (Internal Revenue Service not authorized to issue summons under § 7602 solely for criminal purpose inasmuch as authority of Internal Revenue Service to issue summons under § 7602 was to determine and collect taxes and did not provide for summons issued in criminal investigations).

[191] Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982). After TEFRA, the Internal Revenue Service may issue a summons at any time in furtherance of a criminal investigation until the matter has been referred to the United States Department of Justice for prosecution or the Attorney General makes a request for information concerning a particular taxpayer. 26 U.S.C. § 7602(c) (2000). *See* United States v. Stuart, 489 U.S. 353, 361-65 (1989); *see also* S. REP. NO. 97-494 at 285 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1031.

[192] 26 U.S.C. § 7602 (2000).

[193] United States v. Bisceglia, 420 U.S. 141, 146 (1975); United States v. Powell, 379 U.S. 48, 51 (1964).

[194] United States v. Arthur Young & Co., 465 U.S. 805, 814-15 (1984); United

Although investigations instituted by the Internal Revenue Service pursuant to its summons authority necessarily involve at least some form of an invasion of privacy, the authority is nonetheless necessary to maintain the integrity of the system of self-enforcement.[195] The solution to potential abuse "is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers."[196] While it is possible for the Internal Revenue Service to abuse its power under this broad grant of congressional authority, this power is inherently limited. Section 7604 of the Internal Revenue Code affords substantive protection to taxpayers inasmuch as a summons issued by the Internal Revenue Service can be enforced only by the courts and is not self-enforcing.[197] In other words, a summons may only be enforced

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States v. Norwest Corp., 116 F.3d 1227, 1233 (8th Cir. 1997).

[195] *Bisceglia*, 420 U.S. at 146.

[196] *Id.*

[197] Similar to a grand jury, judicial control and supervision exists in that the enforcement action is an adversary proceeding which provides a judicial determination of challenges to enforcement of the summons. *See* United States v. Rosinsky, 547 F.2d 249, 253 (4th Cir. 1977); United States v. Campbell, 524 F.2d 604, 607 (8th Cir. 1975). Similarly, the grounds on which an administrative summons and a grand jury subpoena may be issued are closely aligned as well as the grounds for challenge. United States v. Dionisio, 410 U.S. 1, 11-12 (1973); Donaldson v. United States, 400 U.S. 517, 526 (1971). The Commissioner's inquisitorial summons power is similar to the powers and limitations vested in grand juries. *Bisceglia*, 420 U.S. at 147-48; *Powell*, 379 U.S. at 57; United States v. Matras, 487 F.2d 1271, 1274 (8th Cir. 1973); United States v. Widelski, 452 F.2d 1, 4 (6th Cir. 1971); Falsone v. United States, 205 F.2d 734, 742 (5th Cir. 1953). *See* Brownson v. United States, 32 F.2d 844, 848 (8th Cir. 1929) ("power granted to the Commissioner . . . to require the attendance of witnesses and the production of books and papers in matters properly under investigation by him is similar to the power vested by analogous statutes in federal grand juries to perform similar acts . . . and . . . [he] should receive a like liberal construction in view of the like important ends sought by the government). In *United States v. Morton Salt Co.*, the Supreme Court discussed the power of the Federal Trade Commission:

> It has a power of inquisition . . . which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it

by judicial endorsement.[198] Therefore, prior to the appearance of a witness or compelling the production of evidence through books and records, the summoned party is entitled to an adversary proceeding to consider objections *prior to* enforcement.[199]

> wants assurance that it is not.

Morton Salt Co., 338 U.S. at 642-43.

In *United States v. Powell*, the Supreme Court equated the power of the Federal Trade Commissioner with that of the Internal Revenue Service, concluding that "[w]hile the power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called in question." *Powell*, 379 U.S. at 57 (in analogizing summons power to subpoena power, the Court determined that the inquiry in not "limited . . . by forecasts of probable result of the investigation" and the United States "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"). *See* Curtis J. Berger, *'Voluntary' Self-Assessment? The Unwilling Extraction of Taxpayer Information*, 42 U. PITT. L. REV. 759, 777 (1981) ("administrative summons rival grand jury subpoena in its powers of tax-related criminal discovery").

[198] 26 U.S.C. § 7604(b) (2000). See *Bisceglia*, 420 U.S. at 146; Reisman v. Caplin, 375 U.S. 440 (1964). 26 U.S.C. § 7604(b) provides:

> (b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

26 U.S.C. § 7604(b) (2000).

Many summons enforcement cases are referred to a United States magistrate judge. While a magistrate judge may issue a report and recommendation to a district court judge, a magistrate judge may not issue a final enforcement order. A United States district judge must issue the final order of enforcement. United States v. Mueller, 930 F.2d 10, 12 (8th Cir. 1991); United States v. First Nat'l Bank of Atlanta, 628 F.2d 871, 873 (5th Cir. 1980).

[199] The Federal Rules of Civil Procedure apply to summary proceedings in which the United States seeks to enforce a summons for tax records. United States v. Donaldson, 400 U.S. 517, 528 (1971). Rule 81(a)(3) of the Federal Rules, however, provides for flexible application of the Federal Rules to summons en-

The question that a court must determine is whether the Internal Revenue Service is acting in good faith in exercising its investigative authority to determine the correct liability of a particular taxpayer.[200] At this enforcement hearing, the summoned party "may challenge the summons on any appropriate ground."[201] The hearing, therefore, prevents the Internal Revenue Service from engaging in a fishing expedition:

> That the power may be abused, is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts.[202]

Congress thus established a buffer between the Internal Revenue Service and taxpayers. "Congress has provided protection from arbitrary and capricious action by placing the federal courts between the Government and the person sum-

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forcement proceedings. *Donaldson*, 400 U.S. at 529. As such, a district court may limit the application of the Federal Rules of Civil Procedure "so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available." *Id.* In effect, district courts are given discretion to tailor the Federal Rules of Civil Procedure to the particular needs and purposes of the proceeding. Courts, in following *Donaldson*, have recognized that a summons enforcement proceeding is "the most appropriate candidate for streamlined procedures." United States v. McCoy, 954 F.2d 1000, 1004 (5th Cir. 1992). FED. R. CIV. P. 81(a)(3) provides in pertinent part:

> These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

FED. R. CIV. P. 81(a)(3).

[200] Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 323 (1985).

[201] Resiman v. Caplin, 375 U.S. 440, 449 (1964). Challenges by taxpayers that the Internal Revenue Service abused its power have been upheld. *See* United States v. Matras, 487 F.2d 1271, 1271 (8th Cir. 1973); United States v. Theodore, 479 F.2d 749, 755 (4th Cir. 1973); United States v. Pritchard, 438 F.2d 969, 971 (5th Cir. 1971); United States v. Dauphin Deposit Trust Co., 385 F.2d 129 (3d Cir. 1967).

[202] McGrain v. Daugherty, 273 U.S. 135, 166 (1927), *quoting* People *ex rel.* McDonald v. Keeler, 2 N.E. 615, 626 (N.Y. 1885). *See Powell*, 379 U.S. at 58 ("[i]t is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.").

monsed."[203] In addition, an order of enforcement of an Internal Revenue Service summons by a district court is a final order that may be appealed.[204] It is precisely because a summons is issued at the investigative stage and not an adjudication of a taxpayer's liability that the standards for enforcement of a summons are minimal. And, while probable cause is unnecessary for enforcement of a summons, a court will not enforce a summons unless the Internal Revenue Service conducts the investigation for a legitimate purpose, the inquiry is relevant to that legitimate purpose, that the material demanded by the Internal Revenue Service is not already in its possession and the procedural requirements of the Internal Revenue Code are satisfied.[205] Collectively, the standards are the *Powell* requirements.

In order to satisfy these minimal standards,[206] the Internal Revenue Service must demonstrate that it is conducting an investigation for a legitimate purpose. As such, the Internal

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[203] *Bisceglia*, 420 U.S. at 151.

[204] Church of Scientology v. United States, 506 U.S. 9, 15 (1992).

[205] *Powell*, 379 U.S. at 57-58. These standards generally dictate that a summons should be enforced as long as the Internal Revenue Service acts in good faith in issuing a summons. United States v. Stuart, 489 U.S. 353, 359-60 (1989); United States v. Euge, 444 U.S. 707, 714-17 (1980); *Bisceglia*, 420 U.S. at 145-46. As a result, it is irrelevant to enforcement of a summons that the investigation or the documents sought may prove fruitless.

Arguments that the summons power is unconstitutional as an unreasonable search and seizure under the Fourth Amendment and compels a taxpayer to be a witness against himself that violates the Fifth Amendment have been dispelled. Shapiro v. United States, 335 U.S. 1, 32 (1948); Falsone v. United States, 205 F.2d 734, 739 (5th Cir. 1953); Stillman v. United States, 177 F.2d 607, 617 (9th Cir. 1949); Sushan v. United States, 117 F.2d 110, 117 (5th Cir. 1941); Nicola v. United States, 72 F.2d 780, 784 (3d Cir. 1934); Bolich v. Rubel, 67 F.2d 894, 895 (2d Cir. 1933).

[206] A prima facie case for enforcement of a summons is usually made through a declaration of the agent of the Internal Revenue Service authorized to issue the summons. United States v. Gilleran, 992 F.2d 232, 233 (9th Cir. 1993); Liberty Fin. Servs. v. United States, 778 F.2d 1390, 1392 (4th Cir. 1985). If the United States establishes a prima facie case, the district court issues an order to the summoned party to show cause why the summons ought not be enforced. United States v. Bichara, 826 F.2d 1037, 1039 (11th Cir. 1987). The summoned party then bears the burden of showing that one of the four *Powell* elements have not been met or that enforcement of the summons would otherwise constitute an abuse of the court's process. LaMura v. United States, 765 F.2d 974, 979 (11th Cir. 1985). *See Powell*, 379 U.S. at 58.

Revenue Service must act in good faith and not use the summons for an improper purpose.[207] Second, the inquiry must be relevant to that purpose. Congress has provided the Internal Revenue Service with expansive authority under § 7601 to investigate "all persons . . . who may be liable" for federal taxes. To implement this broad charge, § 7602 must be equally as expansive. Under § 7602, the summons authority of the Internal Revenue Service permits examination of "any books, papers, records, or other data which *may be relevant* to, among others, the determination of the correct tax liability of a taxpayer."[208] Consequently, the threshold for surpassing this standard is low.[209]

The common response by taxpayers to this broad authority, however, is that the summons issued by the Internal Revenue Service is too broad, too indefinite and too burdensome, which results in an unreasonable search under the Fourth Amendment. To pass constitutional muster, the summons must merely describe the documents with sufficient particularity and not be excessive for purposes of the inquiry.[210]

In satisfying the third part of the *Powell* requirements, the

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[207] An improper purpose includes the issuance of a summons after the matter has been referred to the Department of Justice for criminal prosecution.

[208] 26 U.S.C. § 7602 (2000) (emphasis added). "The language 'may be' reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation, without reference to admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized." United States v. Arthur Young & Co., 465 U.S. 805, 814 (1984).

[209] *Arthur Young & Co.*, 465 U.S. at 814-15 (question is not whether records sought and disclosed will contradict the return of a taxpayer but whether the records might throw light upon the correctness of the return). *See* United States v. Noall, 587 F.2d 123, 125 (2d Cir. 1978) (threshold is "very low" because of inherent difficulties in determining prior to examination of summoned records whether they will assist in determining correct tax liability).

[210] See Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 209 (1946). This determination is not made by looking at the volume of documents requested by the Internal Revenue Service, but whether the summons describes the requested documents in sufficient detail as to inform the summoned party of what is to be produced. United States v. Abrahams, 905 F.2d 1276, 1282, 1285 (9th Cir. 1990). *See* Spell v. United States, 907 F.2d 36, 39 (4th Cir. 1990); United States v. Reis, 765 F.2d 1094, 1096 (11th Cir. 1985); United States v. Lindsteadt, 724 F.2d 480, 483 (5th Cir. 1984).

Internal Revenue Service must show that the summoned information is not already in the possession of the Internal Revenue Service.[211] Finally, the Internal Revenue Service must demonstrate that it has complied with all of the administrative steps required by the Internal Revenue Code.[212]

Significantly, a summons and its enforcement is not an adjudication of a tax liability of a taxpayer, it is merely an invetigative tool to assist the Internal Revenue Service in ascertaining the correctness of a tax return.[213] If a taxpayer disagrees with the determination by the Internal Revenue Service that the taxpayer has not properly reported its income tax liabiilty on a return, the taxpayer may petition the United States Tax Court, a federal district court or the Court of Federal Claims for review of the determination by the Internal Revenue Service.[214] The summons has no impact on the resolution by these courts of the merits of a subsequent challenge to the determination by the Internal Revenue Service. The summons merely provides that the Internal Revenue Service will have more information to assist it in carrying out its congressionally-mandated duty to canvass and inquire and, ultimately, contribute to the integrity of the voluntary system of taxation.[215]

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[211] This requirement is commonly satisfied by the declaration of the Internal Revenue agent issuing the summons. The party opposing the summons must then demonstrate not only that the Internal Revenue Service possesses the summoned information, but that the information is readily retrievable. *See* United States v. John G. Mutschler & Assoc., 734 F.2d 363, 367-68 (8th Cir. 1984); United States v. Davis, 636 F.2d 1028, 1037 (5th Cir. 1981).

[212] This standard is satisfied by reissuance of a defective summons. In cases in which a defective summons cannot be cured, courts have traditionally adopted a harmless error rule. In interpreting this rule, the failure to follow the administrative steps required by the Internal Revenue Code does not serve to automatically invalidate a summons, but triggers an inquiry by the court as to the seriousness of the violation under all of the circumstances. *See* Sylvestre v. United States, 978 F.2d 25, 28 (1st Cir. 1992); United States v. Payne, 648 F.2d 361, 363 (5th Cir. 1981).

[213] Inasmuch as a summons serves an investigatory purpose, a summons enforcement proceeding is intended to be summary in nature; however, a district court may, in its discretion, allow a taxpayer an evidentiary hearing to challenge the good faith of the Internal Revenue Service in issuing the summons. To obtain an evidentiary hearing, a taxpayer must show more than mere conclusory allegations; a taxpayer must raise substantive evidence of abuse by the Internal Revenue Service. *See* Hintze v. IRS, 879 F.2d 121, 126 (4th Cir. 1989); United States v. Balanced Fin. Mgmt., Inc., 769 F.2d 1440, 1444 (10th Cir. 1985)

[214] *See* United States v. Mueller, 930 F.2d 10, 12 (8th Cir. 1991) (taxpayer "could not use the proceedings to enforce the IRS summons as a forum in which to contest the validity of the underlying assessments").

In an enforcement proceeding before a federal district court, a taxpayer can argue that the information requested is not material or is not relevant or that disclosure would violate a privilege created under common law such as the relationship between attorney and client, between husband and wife or between physician and patient. Finally, a taxpayer may argue that the information requested may violate the privilege against self-incrimination under the Fifth Amendment. This latter privilege is the privilege on which the Internal Revenue Service should direct greater focus and attention and remove one of its internal barriers.

While the Internal Revenue Service routinely and blindly accepts the privilege against self-incrimination as a prohibition to enforcement of summons,[216] it should not. The required records doctrine, combined with the collective entity doctrine, abrogates the need for the Internal Revenue Service to accept the invocation of the privilege to prevent a summons from compelling production of documents otherwise necessary to ascertain the correctness of a taxpayer's return as mandated by §§ 7601 and 7602. Under the required records doctrine, the privilege against self-incrimination does not apply to records which are required to be kept.[217]

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[215] In enforcing a summons, it is precisely for this reason that a federal district court should not look at the strength of the reasons that the information sought pursuant to a summons may assist the Internal Revenue Service in ensuring that a taxpayer reported the correct tax liability. *See Powell*, 379 U.S. at 56 (no reason to believe that "Congress intended the courts to oversee the Commissioner's determinations to investigate"); Tiffany Fine Arts v. United States, 469 U.S. 310, 323 (1985) (Internal Revenue Service entitled to determine relevancy).

[216] *See* Bittker, *supra* note 185, at 485.

[217] The scope of the inquiry by the Internal Revenue Service should be narrowly tailored to prevent a solution which is not much better than the inability to access information—that is that taxpayers would provide too much information and overwhelm the same limited resources that this proposal was designed to remedy by "burying everybody in paperwork." Christopher Bergin, Heidi Glenn & Warren Rojas, Top Officials Preview Upcoming Anti-Corporate-Shelter Initiative, 90 TAX NOTES 1295, 1295 (Mar. 5, 2001); *see also* Kenneth J. Kies,

Section 6001 of the Internal Revenue Code is the provision that requires maintenance of tax records. As Professor Bittker notes, "the required records doctrine comes close to investing the regulated citizen with the mantle of an unpaid, involuntary recorder of deeds who must record *his own* deeds."[218] The fact that the Internal Revenue Service has this authority but declines to utilize it is part of its failure to implement the broad mandate of Congress under § 7601 "to proceed . . . and inquire after and concerning all persons . . . who may be liable to pay any internal revenue tax."[219] Its failure is not wholly based on the lack of sufficient appropriations from Congress (i.e. external forces); its failure is based in part on the inefficient utilization of the broad implementation device granted to it by Congress under § 7602 to examine books and records (i.e. internal restrictions).

The Internal Revenue Manual provides that a summons can only require a witness to appear on a given date to give testimony and to bring existing books, papers and records. According to the Manual, a summons cannot require a witness to prepare or create documents, including tax returns, that are not currently in existence.[220]

The Internal Revenue Manual also provides that the execution of a handwriting exemplar is not the preparation or creation of a document.[221] This appears to be inherently inconsistent.

Notwithstanding this inconsistency, the Code supplies the Commissioner with the broad authority to make inquiries necessary to enforce the revenue laws of the United States. The restriction of the statutory summons authority to the production of records previously in existence seriously undermines the purpose of the summons authority in the first place—to insure

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Pricewaterhouse Coopers, LLP, *Comments on Senate Finance Comm. Corporate Tax Shelter Draft Legislation*, TAX NOTES TODAY, June 16, 2000 at 117-12; John D. McKinnon, *Professional Groups Criticize Tax-Shelter Rules*, WALL ST. J., June 12, 2000, at A2.

[218] Bittker, *supra* note 185, at 486.

[219] 26 U.S.C. § 7601 (2000).

[220] Internal Revenue Manual § 4022.64(4) (CCH 1977).

[221] *Id.*

that federal taxes are assessed and collected and to deter the proliferation of tax evasion. Significantly, however, the Internal Revenue Manual does not confer substantive or procedural rights to taxpayers. Taxpayers have no standing to challenge the failure of an agent of the Internal Revenue Service to follow the Manual.[222] Moreover, the Internal Revenue Service should change the provisions in the Internal Revenue Manual restricting the use of the summons authority of the Internal Revenue Service. Further, the Internal Revenue Service does not have to provide a notice and comment period for taxpayers to object to any amendments to the Internal Revenue Manual.

Since the Manual provides no rights to taxpayers, either substantive or procedural, taxpayers may not seek recourse at the administrative level, but through the judicial process. Of course, an unfavorable ruling through the judicial process can be remedied by congressional legislation. The current policy is simply one created by the Internal Revenue Service on itself and by itself. It is time to change the policy and allow the constitutional and democratic processes to run their course.

The efficiency and integrity of the tax system should not be based on an administrative whim but on an adversarial proceeding contested through a court system established for such challenges and/or by the officials elected to determine how to raise revenue. Taxpayers are influenced not only by the tax compliance of others but more importantly by the perceived level of tax compliance by others. In his last report to the Internal Revenue Service Oversight Board, former Commissioner Rossotti noted the increasingly bleak outlook:

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[222] United States v. Caceres, 440 U.S. 741, 752-53 (1979) (error by an executive agency in interpreting its own regulations does not raise any constitutional questions); Fortney v. United States, 59 F.3d 117, 120-21 n.2. (9th Cir. 1995) (conduct of Internal Revenue agent governed by the statute, not a manual); Keado v. United States, 853 F.2d 1209, 1214 (5th Cir. 1988) ("[p]rocedures or rules adopted by the IRS are not law"); Groder v. United States, 816 F.2d 139, 142 (4th Cir. 1987); United States v. Will, 671 F.2d 963, 967 (6th Cir. 1982) (guideline 'adopted solely for the internal administration of the IRS, rather than for the protection for the taxpayer, does not confer any rights upon the taxpayer"); United States v. Equitable Trust Co., 611 F.2d 492, 500 (4th Cir. 1979) (violation by Internal Revenue Service is own regulations is not proof by itself of bad faith of the Internal Revenue Service).

> Over the last ten years, the size and complexity of the tax system increased enormously. Beyond the simple increase in number of taxpayers and revenue dollars, the majority of tax revenues now come from sources that are more subject to manipulation by those who wish to pay less than the law requires and much more difficult and time consuming for our agents to uncover. Meanwhile, the size of the IRS declined, not just relatively but in absolute terms, because of budget constraints.
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> Recognizing the IRS' diminished capacity, promoters and some tax professionals are selling a wide range of tax schemes designed to improperly reduce taxes to taxpayers based on the simple premise: they can get away with it. When this perception becomes increasingly widespread, the essential pillar of our tax system is lost – namely, the belief of honest taxpayers that if someone does not pay what he or she owes, then the IRS will do something about it.[223]

As former Commissioner Rossotti explains, there are enough external forces that negatively impact the ability of the Internal Revenue Service to effectively enforce the revenue laws of the United States. As part of the solution, the Internal Revenue Service must eliminate the restrictions it has placed on itself.

Two principles follow. First, the records required to be maintained to validate a tax return position must be maintained under § 6001, and the Internal Revenue Service must challenge claims of taxpayers that the Fifth Amendment privilege against self-incrimination protects against the production of documents required to be maintained by statute. Acceptance of this claim prevents the Internal Revenue Service from obtaining documents in existence that have a bearing on the correctness of a tax return. Second, the Internal Revenue Service should accept the twenty-year-old invitation of the Supreme Court and require taxpayers of artificial entities to create documents not in existence if the documents should have otherwise been maintained to substantiate the correctness of a tax liability as required by § 6001.[224]

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[223] Commissioner Charles O. Rossotti, *Report to the IRS Oversight Board: Assessment of the IRS and the Tax System* 1-2 (Sept. 2002).

The tax gap is $200 billion or maybe even $300 billion. We may not be able to fix the core of this problem, but we can certainly work on the fringes. The Supreme Court has consistently recognized the expansive nature of the summons authority of the Internal Revenue Service to promote the effective and fair administration of the tax laws of the United States. To ensure the integrity of the tax system, the Internal Revenue Service must be armed with and use this wide-ranging fact-gathering tool. This must necessarily include the good faith use of all investigative tools available to it as provided by Congress to assess and collect the correct tax liability of taxpayers. After all, under § 7601, is the Internal Revenue Service not authorized to do what is necessary to determine the correct tax liability of a taxpayer? As I began this piece—I may not necessarily agree with the substantive components of our tax laws, but if we have tax laws, they ought to be enforced.[225]

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[224] United States v. Euge, 444 U.S. 707, 718 n.11 (1980).

[225] *See* Pearlman, *supra* note 149, at 292 ("Whatever the state of the substantive law, effective enforcement should encourage a reasonable level of compliance . . . .").

COMMENT

Changing the Deal: How *Omnicare v. NCS Healthcare* Threatens to Fundamentally Alter the Merger Industry

How far can the board of directors of a company engaging in merger negotiations go to secure or "lock-up" an offer by another company before the stockholders of the target company vote to either approve or reject the offer? Can a board of directors agree to submit a merger agreement to a stockholder vote when the acquiring corporation has already secured voting agreements with a majority of the stockholders, making the stockholder vote a mere formality? Furthermore, what role do the board's fiduciary duties to minority shareholders play in this determination? In today's business world of high profile corporate scandals and investigations, such seemingly mundane issues of corporate law rarely garner the attention of the mainstream media, much less the general public. However, in the multi-billion dollar a year merger and acquisition industry, these issues have far reaching effects for both target and acquiring corporations, practitioners and, ultimately, the stockholding public in general. The recent Delaware Supreme Court decision in *Omnicare, Inc. v. NCS Healthcare, Inc.*,[1] has brought these issues to the forefront of the mergers and acquisitions industry and threatens to fundamentally change the way these negotiations and transactions are handled.[2]

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[1] 818 A.2d 914 (Del. 2003).

This comment is divided into four sections. The first section provides a brief summation of the facts in *Omnicare*. The second section contains the court's decision on the appropriate standard of review and a discussion of the potential repercussions for parties engaged in merger negotiations. The third section contains the court's application of the standard of review to the *Omnicare* facts and a comparison with past applications. Finally, the fourth section analyzes the court's requirement of a fiduciary out for the board of directors to comply with their fiduciary duties under the facts of the case.

I. FACTS

Omnicare addressed merger lock-up provisions in the "last period of play."[3] The case centered on a merger agreement between NCS Healthcare, Inc. (NCS) and Genesis Health Venture, Inc. (Genesis).[4] NCS had experienced business difficulties related to changes in "the timing and level of reimbursements by the government and third-party providers" that had adversely affected the healthcare industry as a whole.[5]

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[2] Although this decision only technically affects Delaware corporations, it should be noted that over forty percent of companies listed on the New York Stock Exchange and eighty percent of publicly traded Fortune 500 companies are incorporated in Delaware. Leo Herzel & Laura D. Richman, *Forward* to R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS (3d ed. 1997). Mississippi law of corporate governance is far from home grown. James L. Robertson, *The Law of Corporate Governance: Coming of Age in Mississippi*, 65 MISS. L.J. 477, 497 (1996). Therefore, Mississippi courts regularly resort to extra-Mississippi sources in the corporate law-making processes. *Id.* Consequently, decisions by the Delaware Supreme Court are likely to influence not only Mississippi courts but courts across the country.

[3] The "last period of play" refers to the time between when the board of directors of a target company signs a merger agreement and the company's stockholders approve the deal. Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1900 (2003).

[4] *Omnicare*, 818 A.2d at 917. NCS, a Delaware corporation headquartered in Beechwood, Ohio, is a "leading independent provider of pharmacy services to long-term care institutions including skilled nursing facilities, assisted living facilities and other institutional healthcare facilities." *Id.* at 918. Genesis, a Pennsylvania corporation headquartered in Kennett Square, Pennsylvania, is also a leading provider of healthcare and support services to the elderly. *Id.* at 919.

[5] *Id.* at 920. NCS common stock, which had traded above $20 in January

In response to the financial problems it was facing, NCS retained UBS Warburg, L.L.C. to search for potential buyers and equity investors but only received one non-binding indication of interest valued at approximately $190 million.[6] In April 2001, NCS was given a formal notice of default on its Convertible Subordinated Debentures (Notes) and a committee was formed to represent the interests of the Noteholders.[7] In the summer of 2001, NCS invited Omnicare, Inc. (Omnicare) to begin discussions regarding a possible transaction.[8] Multiple rounds of negotiations led to an initial bid by Omnicare of $270 million, structured as an asset sale in bankruptcy and, eventually, to a bid of $313,750,000.[9]

In early 2002, the financial performance of NCS began to improve.[10] In March 2002, the NCS board decided to form an independent committee of board members who were neither NCS employees nor major NCS stockholders (Independent Committee), but the board still maintained the authority to negotiate possible transactions for NCS.[11] Two of the four

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1999, was traded at around $5 by the end of 1999. *Id.* By early 2001, NCS had defaulted on approximately $350 million in debt, "including $206 million in senior bank debt and $102 million of its 5¾% Convertible Subordinated Debentures." *Id.* After the default, NCS's common stock traded in the range of $0.09 to $0.50 until the announcement of the proposed deal with Genesis. *Id.*

[6] *Id.* This proposal was substantially less than the face value of NCS senior debt and was reduced by twenty percent after the offeror conducted its due diligence review. *Id.* In December 2000, NCS retained Brown, Gibbons, Lang & Company as its exclusive financial advisors after terminating its relationship with UBS Warburg. *Id.* at 921.

[7] *Id.* Around this time, NCS began discussing the possibility of a restructuring in a "pre-packaged" bankruptcy with various investor groups. *Id.*

[8] *Id.* at 921. Omnicare, a Delaware corporation with its principle place of business in Covington, Kentucky, is in the institutional pharmacy business. *Id.* at 919.

[9] *Omnicare*, 818 A.2d at 921. Omnicare's initial proposals were structured as asset sales in bankruptcy. *Id.* These proposals, while substantially higher than any previous bids, would have provided no recovery for the NCS stockholders and only a small recovery for the Noteholders. *Id.* Omnicare proceeded to secretly negotiate with the committee representing the Noteholders and continued its pursuit of a transaction structured as an asset sale in bankruptcy. *Id.*

[10] *Id.* at 922. Because of this, the NCS directors began to believe that a transaction providing recovery to the NCS stockholders was possible. *Id.*

[11] *Id.* The NCS board of directors consisted of four members: John H. Outcalt, Chairman of the NCS board; Kevin B. Shaw, President and CEO of NCS; Boake

directors, John Outcalt and Kevin Shaw, were also the majority shareholders, collectively controlling over sixty-five percent of the voting stock, but only owning around twenty percent of the total outstanding NCS stock.[12] The NCS board believed that the creation of the Independent Committee was necessary because, due to the uncertain financial position of the company, the board's fiduciary duties were owed to the enterprise as a whole and not just the NCS stockholders.[13] In May 2002, the Independent Committee began negotiations with the CEO and CFO of Genesis that resulted in a proposed transaction outside of bankruptcy.[14] Genesis expressed to the Independent Committee that it would not negotiate with NCS as a "stalking horse," meaning that Genesis did not want to spend the time and effort to set forth a valuation of NCS only to be later topped by another bidder.[15] As negotiations continued, Genesis demanded that NCS enter into an exclusivity agreement in which NCS would negotiate only with Genesis for a

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A. Sells, Chairman and CEO at Revco Drugstores in Cleveland, Ohio; and Richard L. Osborne, full-time professor at the Weatherhead School of Management at Case Western Reserve University. *Id.* at 918-19. The Independent Committee consisted of only Sells and Osborne. *Id.* at 922.

[12] *Id.* Outcalt owned 202,063 shares of NCS Class A common stock and 3,476,086 shares of Class B common stock; Shaw owned 28,905 shares of Class A common stock and 1,141,134 shares of Class B common stock. *Id.* at 918-19. The Class A shares were entitled to one vote per share, while the Class B shares were entitled to ten votes per share. *Id.* at 918. As of July 28, 2002, NCS had 18,461,599 Class A and 5,255,210 Class B shares outstanding. *Id.* at 919. Therefore, because of the superior voting rights of the Class B stock, Outcalt and Shaw controlled 46,403,168 votes out of a total of 71,013,699 votes.

[13] *Id.* at 922. Although the Independent Committee could negotiate transactions, authority to approve any transaction remained with the full four-member board. *Id.*

[14] *Omnicare*, 818 A.2d at 922. The initial offer provided for full repayment of all NCS senior debt, an exchange offer or direct purchase of the Notes with a combination of cash and Genesis common stock equal to the par value of the Notes, full assumption of all trade credit obligations and $20 million in value for the NCS common stock. *Id.* Genesis had previously negotiated with the committee representing the Noteholders in January 2002, after emerging from a recent bankruptcy of its own. *Id.* at 921.

[15] *Id.* at 922. Genesis had recently lost a bidding war with Omnicare in a different transaction that had left bitter feelings between the principles of the two companies. *Id.* at 921. Consequently, Genesis wanted a level of certainty that, to the extent it was willing to seek a negotiated merger transaction, it would be able to consummate the transaction it negotiated with the NCS board. *Id.*

set period of time.[16]

On July 26, 2002, Omnicare faxed NCS a letter outlining a proposed transaction in which Omnicare would retire all of NCS's senior and subordinated debt at par plus accrued interest and pay the NCS stockholders three dollars cash per share or over seventy-one million in cash.[17] Despite the exclusivity agreement, the Independent Committee met to discuss the Omnicare proposal but concluded that, mainly because of Omnicare's due diligence requirement, discussions with Omnicare about the proposal would result in an unacceptable risk that Genesis would abandon its proposal.[18]

NCS notified Genesis of the Omnicare proposal, and, as a result, Genesis substantially improved the terms of its proposal such that the NCS stockholders would receive approximately forty-three million dollars worth of Genesis stock.[19] However, in exchange for these concessions, Genesis demanded that the NCS board authorize voting agreements between Genesis and Omnicare's two largest shareholders, Outcalt and Shaw, and that the NCS board agree to submit the agreement to the stockholders regardless of whether the board continued to recommend the merger.[20] In addition, the merger agreement failed to provide a "fiduciary out" clause for the board of directors, which, combined with the voting agreements and the stockholder vote requirement, completely precluded any other offers from succeeding, no matter how attractive.[21] Omnicare responded by irrevocably committing itself to a $3.50 per share cash tender offer for all of NCS Class A and B common stock, for a total of eighty-three million dollars, and initiating litigation to prevent the NCS/Genesis merger from going forward.[22] Omnicare believed that the NCS board had violated its fiduciary duties in agreeing to the above lock-up provisions and also challenged the validity of the stockholder voting agreements between Genesis and the two majority NCS shareholders.[23] Some of the NCS shareholders also brought a class action suit to invalidate the merger agreement, claiming that the directors of NCS violated their fiduciary duty of care by "failing to establish an effective process designed to achieve the transaction that would produce the highest value for the

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[16] *Id.* at 922. In exchange for this agreement, Genesis increased its offer for the NCS common stock by $4 million to a total of $24 million. *Id.* at 922-23. The duration of the exclusivity agreement was extended to July 26, 2002, and later to July 31. *Id.* at 923.

[17] *Id.* at 924. Although the proposed transaction was superior to the Genesis proposal, it was expressly conditioned on negotiating a merger agreement, obtaining certain third party consents and Omnicare's completion of its due diligence. *Id.*

[18] *Id.* at 924. Because of Omnicare's past bankruptcy proposals, its unwillingness to consider a merger and its secret negotiations with the Noteholder's committee, NCS notified Omnicare that this condition must be dropped if the proposal had any chance of succeeding. *Id.* However, after consultations with its advisors on July 26, Omnicare decided to keep the condition. *Id.*

[19] *Omnicare*, 818 A.2d at 924. Genesis offered to pay the Noteholders accrued interest plus a small redemption premium, as required by the indenture, thereby eliminating the need for their consent to the transaction. *Id.* Genesis also lowered the termination fee in the merger agreement from $10 million to $6 million. *Id.* at 924-25. Finally, Genesis agreed to increase the exchange ratio for NCS common stock to one-tenth of a Genesis common share for every NCS share, an eighty percent increase. *Id.* at 924.

[20] *Id.* at 925. The voting agreements between Outcalt and Shaw committed

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them to vote in favor of the Genesis/NCS merger and were specifically enforceable against them. *Id.* Recent amendments to the Delaware General Corporation Law (DGCL) provided that, "[t]he terms of the [merger] agreement may require that the agreement be submitted to the stockholders whether or not the board of directors determines at any time subsequent to declaring its advisability that the agreement is no longer advisable and recommends that the stockholders reject it." DEL. CODE ANN. tit. 8, § 251(c) (2001). In addition, Genesis demanded that the NCS board either approve the merger agreement by midnight of July 28, or else Genesis would terminate its offer. *Omnicare*, 818 A.2d at 925.

[21] *Id.* at 925-26. The term "fiduciary out" is a shorthand term used to refer to a "right of termination or forgiveness of certain covenants contained in the merger agreement . . . ." Michael A. Stanchfield, *Fiduciary Duties in Negotiated Acquisitions: Questioning the Legal Requirements for "Outs,"* 27 WM. MITCHELL L. REV. 2261, 2262 n.2 (2001). Fiduciary outs essentially allow a board to breach certain contractual obligations arising out of the merger agreement in order to comply with the fiduciary duties the board owes to its stockholders. It is an open question among scholars and practitioners whether fiduciary outs are "prescribed by law or [are] merely . . . optional contractual provision[s], to be included or excluded from a merger agreement based on the parties' information and bargaining power." *Id.*

[22] *Omnicare*, 818 A.2d at 927. Omnicare dropped its due diligence requirement, and the NCS board dropped its recommendation that its stockholders vote in favor of the NCS/Genesis merger. *Id.* at 926.

[23] *Id.* at 919. The Chancery Court dismissed Omnicare's fiduciary duty claims because it believed Omnicare lacked the necessary standing to bring those claims. *Id.* Certain Omnicare stockholders were able to successfully bring these fiduciary duty claims. *See infra* note 24 and accompanying text.

NCS stockholders."[24]

II. STANDARD OF REVIEW: DOES *UNOCAL* APPLY?

The first major issue decided by the Delaware Supreme Court was the standard of review to apply to the terms in the agreement that locked-up the merger for Genesis.[25] Traditionally, Delaware courts have applied the common law business judgment rule to actions by boards of directors in merger negotiations, which usually results in judicial deference to the board's decision-making process.[26] However, the landmark case of *Unocal Corp. v. Mesa Petroleum Co.*[27] established that enhanced judicial scrutiny should be applied to a board's adoption of defensive measures in response to a hostile takeover proposal that it believes is a threat to corporate policy and effectiveness.[28] This enhanced scrutiny requires that, before the business judgment rule and its accompanying judicial deference will apply, a board must show that (1) there were reasonable grounds for believing that a danger to corporate policy and effectiveness existed,[29] and (2) the action taken was "reasonable in relation to the threat posed."[30] In discussing what actions would or would not be reasonable to the threat posed, the court cryptically stated that a board does not have "unbridled discretion to defeat any perceived threat by any Draconian means available."[31]

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[24] *Omnicare*, 818 A.2d at 919. The NCS stockholders were understandably anxious to have the merger agreement between NCS and Genesis invalidated, since the Omnicare proposal would provide almost double the value to the NCS stockholders than would the Genesis proposal. *See supra* notes 19, 22 and accompanying text. This case is a consolidated appeal from separate orders by the Delaware Chancery Court. *Omnicare*, 818 A.2d at 919.

[25] *Omnicare*, 818 A.2d at 927. "The defining tension in corporate governance today is the tension between deference to directors' decisions and the scope of judicial review." E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 403 (1997).

[26] *Omnicare*, 818 A.2d at 927-28. The business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). When considering director conduct in a takeover, the business judgment rule will not allow a court to substitute its judgment for that of the directors if the latter's decision can be "attributed to any rational business purpose." Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). *See* DEL. CODE ANN. tit. 8, § 141(a) (2001) (stating that boards of directors shall manage business and affairs of every corporation organized in Delaware).

[27] 493 A.2d 946 (Del. 1985).

[28] *Unocal*, 493 A.2d at 954-55. The main justification given by the court for this increased scrutiny is the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." *Id.* at 954. Therefore, "directors may not [act] solely or primarily out of a desire to perpetuate themselves in office." *Id.* at 955. *Unocal* dealt with a selective stock repurchase that was offered in response to a "front-loaded" two-tier tender offer by Mesa for thirty-three percent of Unocal's stock at $55 per

The court in Omnicare held that *Unocal* enhanced scrutiny should be applied because it found that a board's decision to use "defensive devices against uninvited competing transactions that may emerge is analogous to a board's decision to protect against dangers to corporate policy and effectiveness when it adopts defensive measures in a hostile takeover contest."[32] The dissent criticized this decision because it rea-

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share. *Id.* at 949. Mesa, already a thirteen percent shareholder, planned to repurchase the remaining publicly held Unocal stock with securities purportedly worth $54 per share, although that value was highly questionable. *Id.* at 949-50. In order to defeat this hostile tender offer, the Unocal board decided to initiate a "self-tender" to buy back shares from all willing shareholders, except Mesa, for $72 per share. *Unocal*, 493 A.2d at 950-51.

[29] *Id.* at 955. A board can satisfy this burden by showing both good faith and reasonable investigation. *Id.* (citing Cheff v. Mathes, 199 A.2d 548, 554-55 (Del. 1964)). Approval of a board made up of a majority of outside directors will materially enhance the proof that this requirement has been met. *Id.*

[30] *Id.* This proportionality review should consider factors such as, but not limited to, whether the price of the takeover offer is inadequate, the impact on interested parties other than shareholders, questions of illegality and the quality of securities being offered in the exchange. *Id.* at 955-56. The proportionality test is the truly revolutionary aspect of *Unocal* because it "brings a[n] . . . objective standard to the review of defensive tactics—a reasonableness test that impliedly allows courts to identify and reject unreasonable tactics, whatever the motives of their authors." Ronald J. Gibson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?* 44 BUS. LAW. 247, 251 (1989).

[31] *Unocal*, 493 A.2d at 955-56. The *Unocal* court never defined what actions by a board would be considered "Draconian," which later led to substantial uncertainty by courts applying *Unocal* enhanced scrutiny. *See infra* note 39 and accompanying text.

[32] Omnicare, 818 A.2d at 932. This holding by the court seems to resolve an ongoing debate in the academic community over the scope in which enhanced scrutiny should apply to defensive tactics in the merger context. *See* Mark Lebovitch & Peter B. Morrison, *Calling a Duck a Duck: Determining the Validity*

soned that there was no threat that the board was acting out of its own self-interest; therefore, the lock-up provisions should not be considered defensive in nature.[33]

This classification of all merger lock-up measures as "defensive in nature" could signal the death knell for the business judgment rule as it relates to mergers in the last period of play.[34] In addition, the "omnipresent specter" of board self-interest can no longer be cited as the primary reason for applying *Unocal* enhanced scrutiny.[35] This would be a significant erosion of the judicial deference traditionally granted to boards of directors by Delaware courts and would subject all merger lock-up agreements to *Unocal* scrutiny.[36]

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of Deal Protection Provisions in Merger of Equals Transactions, 2001 COLUM. BUS. L. REV. 1, 8-14 (2001) (arguing that all deal protection devices are inherently defensive and should therefore be examined under *Unocal* enhanced scrutiny). *But see* Griffith, *supra* note 3, at 1913 (arguing that *Unocal* enhanced scrutiny should only apply to deal-protection devices adopted in response to hostile bidder).

[33] *Omnicare*, 818 A.2d at 943 n.102 (Veasey, C.J., dissenting). The dissent distinguished the facts of *Omnicare* from the court's decision to apply enhanced scrutiny in *Paramount Communications, Inc. v. Time, Inc.*, 501 A.2d 1140, 1148 (Del. 1989) by pointing out that the Time and Warner boards of directors, in that case, restructured a proposed transaction from a merger into an acquisition *in response* to an unsolicited bid from Paramount. *Id.* (Veasey, C.J., dissenting) (emphasis added). The dissent in *Omnicare* argued that only board actions which are "defensive and reactive in nature" should trigger *Unocal* enhanced scrutiny. *Id.* (Veasey, C.J., dissenting). NCS had approved the lock-up provisions with Genesis before Omnicare had made its offer; therefore, according to the dissent, the board's actions were not defensive in nature, and the business judgment rule should have applied. *Id.* (Veasey, C.J., dissenting).

[34] *See supra* notes 26, 28 and accompanying text. Originally, *Unocal* scrutiny was applied only to defensive measures enacted by a board in response to a hostile takeover bid that the board felt was a threat to corporate policy. *See supra* note 28 and accompanying text. Everything else was accorded judicial deference under the business judgment rule. *Id.* However, classifying all lock-ups as defensive in nature and applying *Unocal* to lock-ups of friendly mergers and acquisitions will preclude any application of the business judgment rule to merger lock-up provisions.

[35] *See supra* note 28 and accompanying text. The board in *Omnicare* was trying to lock-up a transaction that would have resulted in the dissolution of the NCS board. Therefore, it is almost impossible to say that the board was trying to entrench itself or act in its own self-interest. *See supra* note 33 and accompanying text.

[36] *See supra* notes 32, 33 and accompanying text. If, as Chief Justice Veasey says, the defining tension in corporate governance is the "tension between deference to directors' decisions and the scope of judicial review," then the *Omnicare*

III. HOW DOES *UNOCAL* APPLY TO THE *OMNICARE* FACTS?

The second major issue decided by the court was how to apply the *Unocal* enhanced scrutiny.[37] The court easily determined that the NCS board satisfied the first prong of *Unocal*.[38] In applying the proportionality prong of *Unocal*, the court stated that a board must first establish that its defensive measures are not "preclusive" or "coercive," then demonstrate that they are within a range of reasonable responses to the threat perceived.[39] The court then found that the com-

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opinion seems to resolve that tension in favor of heightened judicial review. *See supra* note 25 and accompanying text.

[37] *Omnicare*, 818 A.2d at 932. The court stated that all of a board's defensive actions which are "inextricably related" must be examined "collectively as a unitary response to the perceived threat." *Id.* Therefore, the majority looked at the combined effect of the voting agreements, the covenant requiring a stockholder vote regardless of continued board approval and the lack of a fiduciary out. *Id.* Genesis argued that the stockholder voting agreements should not be considered defensive measures because "stockholders are entitled to vote in their own interest." *Id.* at 934. Genesis cited *Williams v. Geier*, 671 A.2d 1368, 1380-81 (Del. 1996) and *Stroud v. Grace*, 606 A.2d 75, 83 (Del. 1992) for the proposition that these voting agreements were not subject to *Unocal* enhanced scrutiny. *Id.* Without addressing the substance of this argument, the majority simply dismissed it, stating that neither case held that "the operative effect of a voting agreement must be disregarded *per se* when a *Unocal* analysis is applied to a comprehensive and combined merger defense plan." *Omnicare*, 818 A.2d at 934. The dissent rebutted by pointing out that the court in *Stroud* stated that majority stockholders control the corporation in fact and in law, and that this fact "*obviates any threat contemplated by Unocal.*" *Id.* at 944 n.105 (Veasey, C.J., dissenting) (citing *Stroud*, 606 A.2d at 83).

[38] *Id.* at 935. The court stated that the possibility of losing the Genesis offer and being left with no other similar alternative satisfied the requirement for a showing of reasonable grounds for believing that a danger to corporate policy and effectiveness existed. *Id.*

[39] *Id.* A "preclusive" response deprives stockholders of the right to receive all tender offers or precludes a bidder from seeking control by fundamentally restricting proxy contests or otherwise. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388-89 (Del. 1994). A "coercive" response is one that has the effect of causing the stockholders to vote in favor of the proposed transaction for some reason other than the merits of the transaction. *Williams*, 671 A.2d at 1382-83. In the *Unitrin* case, an acquiring corporation sought to prevent the target corporation from repurchasing its own stock in an attempt to defeat the hostile offer of the acquiring corporation. *Unitrin*, 651 A.2d at 1367-68. The chancery court enjoined the repurchase on the ground that it was a disproportionate response to the acquiring corporation's inadequate cash tender offer. *Id.* at 1368. The Delaware Su-

bined effect of the defensive measures was both preclusive and coercive, and the board's actions were therefore void.[40] The dissent strongly disagreed with the majority's use of the *Unitrin, Inc. v. American General Corp.*[41] concepts of "preclusive" and "coercive" as a threshold for applying the proportionality prong of *Unocal*.[42] The dissent argued that this reading of *Unitrin* preempted a proper proportionality review because it did not take into account the fact that these defensive measures were necessary to secure the merger with Genesis.[43]

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preme Court found that the lower court conducted an improper *Unocal* analysis. *Id.* at 1391. The *Unitrin* court stated that once a threat to corporate policy is found, a court must then determine whether the response by the board was Draconian. *Id.* at 1387. It specifically found that both "preclusive" and "coercive" defensive measures were included in the common law definition of Draconian. *Id.* at 1387. If a board's response is not Draconian, then a court must next determine whether it is within the range of reasonableness before the business judgment rule will apply. *Unitrin*, 651 A.2d at 1387-88.

[40] *Omnicare*, 818 A.2d at 935. The majority noted that NCS's public stockholders, who owned eighty percent of NCS and strongly supported Omnicare's proposal, would be forced to accept the Genesis merger because of the structural defenses approved by the NCS board. *Id.* at 935-36. The majority held that any defensive measures adopted by a board, which result in the merger becoming *a fait accompli*, are *per se* coercive. *Id.* at 936.

[41] 651 A.2d at 1388-89.

[42] *Omnicare*, 818 A.2d at 943-44 (Veasey, C.J., dissenting). The dissent distinguished the facts of *Omnicare* from *Unitrin* by pointing out that the defensive measures in *Unitrin* were adopted unilaterally to fend off an existing hostile offer which the board felt threatened corporate policy and effectiveness. *Id.* (Veasey, C.J., dissenting). The dissent argued that the *Unitrin* concepts of "preclusive" and "coercive" were used to ensure that "the stockholders [could] benefit from the board's negotiations with the bidder or others and to exercise effectively the franchise as the ultimate check on board action." *Id.* at 944 (Veasey, C.J., dissenting) (citing *Unitrin*, 651 A.2d at 1379). Therefore, a *Unitrin* analysis was unnecessary because the two controlling stockholders (Outcalt and Shaw) had approved the transaction. *Id.* (Veasey, C.J., dissenting). The dissent downplayed the coercive effect of the defensive measures on the minority-voting stockholders (who owned a majority of the corporation) because they presumably knew when they bought the stock that the two controlling stockholders could approve a merger without any minority votes. *Id.* at 944-45 (Veasey, C.J., dissenting).

[43] *Omnicare*, 818 A.2d at 945 (Veasey, C.J., dissenting). The dissent focused on the facts that NCS bargained for and received concessions from Genesis in exchange for these defensive measures, and "[t]he NCS board agreed to lock up the merger . . . in order to avoid the prospect of Genesis walking away from the deal leaving NCS in the woefully undesirable position of negotiating with a com-

This bifurcated test applied by the majority in analyzing the proportionality prong of *Unocal* is a deviation from the traditionally fact-specific body of Delaware corporate law.[44] As the dissent stated, requiring that a board first prove its defensive measures are neither "preclusive" nor "coercive," before demonstrating that the response is reasonable in relation to the threat posed, will discount the specific facts that led to the adoption of the defensive measures.[45] This is a significant increase in the level of scrutiny provided under the proportionality prong of *Unocal*.[46] After *Omnicare*, any combination of defensive measures that completely lock-up a merger agreement before the actual stockholder vote are considered *per se* "preclusive" and "coercive," and, therefore, are forbidden under *Unocal* enhanced scrutiny no matter how reasonable under the circumstances.[47] The obvious result from this decision

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pany that had worked for months against NCS' interests by negotiating with NCS' creditors." *Id.* at 947 (Steele, J., dissenting).

[44] *See supra* notes 42, 43 and accompanying text; *see also Omnicare*, 818 A.2d at 939 (Veasey, C.J., dissenting) (stating that Delaware corporate law's beauty is that it is based on enabling statute with Court of Chancery and Supreme Court applying principles of fiduciary duty in common law mode on case-by-case basis).

[45] *See supra* notes 42, 43 and accompanying text. Under the principles announced in *Omnicare*, any combination of defensive measures that "preclude" additional offers or "coerce" the stockholder vote will nullify those provisions, regardless of the facts that led to their adoption. *See supra* notes 39, 40 and accompanying text. Therefore, the focus shifts from the circumstances that led to the adoption of defensive measures to the preclusive or coercive nature of the defensive measures.

[46] Originally, *Unocal* stated that a board might not use any Draconian means available to defeat a hostile tender offer. *See supra* note 31 and accompanying text. The court in *Unitrin* included the terms "coercive" and "preclusive" in the common law definition of Draconian. *See supra* note 39 and accompanying text. However, as the dissent noted, the rationale behind *Unitrin* was to ensure that stockholders could benefit from a board's negotiations and exercise their vote as a check on board actions. *See supra* note 42 and accompanying text. In *Omnicare*, the two majority stockholders did approve of the board's actions, albeit through voting agreements and not an actual vote. *See supra* note 20 and accompanying text. Therefore, the majority's rationale behind the no "preclusion" or "coercion" requirements can only be to protect the minority shareholders from board actions that result in a merger agreement becoming *a fait accompli*. *See supra* note 40 and accompanying text. However, the court in *Unitrin* made no mention of the need to protect the *minority* shareholder franchise. *Unitrin*, 651 A.2d at 1378-79 (emphasis added).

[47] As stated by Chief Justice Veasey, this is "a judicially created 'third rail'

would seem to be future litigation concerning when a merger agreement is actually fully locked-up.[48] However, until this issue is resolved, acquiring boards of directors will likely have to err on the side of caution and secure only a fraction of the necessary votes through stockholder voting agreements or risk having them invalidated along with any other deal-protection measures.

IV. FIDUCIARY OUT REQUIREMENT

The third major decision by the court was its requirement of an effective fiduciary out in the merger agreement in order for the board to comply with its fiduciary duties in this particular situation.[49] The court argued that since a majority of the

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that now becomes one of the given 'rules of the game,' to be taken into account by the negotiators and drafters of merger agreements." *Omnicare*, 818 A.2d at 942-43 (Veasey, C.J., dissenting).

[48] *See* Clifford E. Neimeth & Cathy L. Reese, *Locked and Loaded: Delaware Supreme Court Takes Aim at Deal Certainty*, M & A LAW., June 2003, at 9 (opining that only stockholder voting agreements that do not result in mathematical certainty that merger agreement will receive stockholder approval will be permissible under *Omnicare*).

[49] *Omnicare*, 818 A.2d at 936-37. The majority argued that either the coercive and preclusive effect of the defensive measures or the lack of an effective fiduciary out alone were enough to invalidate the lock-up agreements between NCS and Genesis. *Id.* at 936. The court relied on prior Delaware case law holding that contractual provisions, which require a board of directors to act or not act in a manner inconsistent with their fiduciary duties, were invalid and unenforceable. *Id.* at 936 (citing Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 51 (Del. 1993)). *See* RESTATEMENT (SECOND) OF CONTRACTS § 193 (1981) (stating that "a promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy"). These holdings effectively reverse part of the celebrated *Smith v. Van Gorkom* case, which in part held that contract rights in a merger agreement vest regardless of whether or not the directors complied with their fiduciary duties. 488 A.2d 858, 887-88 (Del. 1985). *Cf.* R. Franklin Balotti & Gilchrist Sparks, III, *Deal-Protection Measures and the Merger Recommendation*, 96 NW. U. L. REV. 467, 468-74 (2002) (analyzing practical differences between *Van Gorkom* and *QVC* for boards of directors and practitioners). Some scholars and practitioners believe that this elevation of corporate law principles over contract law heightens the uncertainty of mergers for both the target and bidder, thereby reducing merger activity. *See* Celia R. Taylor, *"A Delicate Interplay": Resolving the Contract and Corporate Law Tension in Mergers*, 74 TUL. L. REV. 561, 597-98 (stating that without contractually mandated protective devices, incentives to incur substantial costs of preparing bid and participating in negotiations are reduced).

voting shareholders were already contractually committed to the merger with Genesis, the board had an affirmative responsibility to protect the financial interests of the minority shareholders.[50] The majority held that no provision in a merger may validly limit or define the scope of a board's fiduciary duties or prevent a board from carrying out its fiduciary duties.[51] Not surprisingly, the dissent argued that this absolute requirement of a fiduciary out was unsupported by Delaware case law and invited unwarranted judicial review into the risk/return analyses of boards of directors, which have traditionally been granted judicial deference under the business judgment rule.[52]

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[50] *Omnicare*, 818 A.2d. at 937 (citing McMullin v. Beran, 765 A.2d 910, 920 (Del. 2000)). In addressing this issue, the Delaware Court of Chancery noted that § 251(c) of the DGCL allowed a board to submit a merger agreement to a stockholder vote, even if it later withdrew its support for the agreement, and stated that "it is simply nonsensical to say that a board of directors abdicates its duties to manage the 'business and affairs' of a corporation under Section 141(a) of the DGCL by agreeing to the inclusion in a merger agreement of a term authorized by § 251(c) of the same statute." *Id.* The majority responded to this by noting that the synopsis to the amendments which enacted § 251(c) stated that "the amendments are not intended to address the question of whether such a submission requirement is appropriate in any particular set of factual circumstances." *Id.*

[51] *Id.* at 938 (citing *QVC*, 637 A.2d at 48). The majority argued that by agreeing to submit the agreement to a stockholder without an effective fiduciary out, it had "disabled itself from exercising its own fiduciary obligations" when it received a subsequent superior offer. *Id. See* Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998) (holding that directors' fiduciary duties do not operate intermittently).

[52] *Omnicare*, 818 A.2d at 945 (Veasey, C.J., dissenting). The dissent argued that the majority wrongly relied on *QVC* to justify its holding. *Id.* (Veasey, C.J., dissenting). The dissent stated that the court's decision in *QVC* was simply an extension of a board's *Revlon* duties. *Id.* (Veasey, C.J., dissenting). *Revlon* duties are triggered when a corporation undertakes a transaction that "will cause: (a) a change in corporate control; or (b) a break-up of the corporate entity." *QVC*, 637 A.2d at 48. Once either of these events occurs, "[t]he duty of the board . . . change[s] from preservation of . . . [the] corporate entity to the maximization of the company's value at a sale for the stockholders' benefit." Revlon, Inc., v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). *QVC* dealt with a merger that would result in a change of control for the target corporation, therefore triggering *Revlon* duties. *QVC*, 673 A.2d at 48. The dissent in *Omnicare* argued that the fiduciary duty pronouncements in *QVC* were predicated upon the transaction in question being subject to *Revlon* scrutiny. *Omnicare*, 818 A.2d at 945-46 (Veasey, C.J., dissenting). Therefore, since the NCS/Genesis merger was not subject to *Revlon* scrutiny, the dissent reasoned that the fiduciary duty language of *QVC* was inapplicable. *Id.* (Veasey, C.J., dissenting).

This requirement of including a fiduciary out in the NCS/Genesis merger agreement to comply with the NCS board's fiduciary duties has the potential to inject a vast amount of uncertainty into the merger process. It is important to note that the court in *Omnicare* did not require that fiduciary outs be included in all merger agreements with lock-up provisions. However, the broad language used by the court, stating that no contractual provision can validly define or limit a board's fiduciary duties, clearly elevates corporate law considerations above contract principles and deal certainty.[53] The justification given for this principle is the need to protect minority shareholders when a majority shareholder or a cohesive group of shareholders form a majority voting block and commit themselves to a merger agreement.[54] The practical effect of this ruling is that, if stockholder approval is assured, a board can never completely prevent itself from considering additional offers or agree to submit the proposal to a stockholder vote under §241(c) of the Delaware General Corporation Law (DGCL) without a board's recommendation to approve the transaction. While on the surface this may appear to favor target companies and their shareholders by allowing a seemingly endless amount of last-minute bid topping by would-be acquirers, the real effect probably will be to prevent companies from initiating negotiations in the first place for fear of being used as a "stalking horse" and topped at the last minute.[55] Considering the unusual circumstances of this case in which the two controlling stockholders also comprised half of the board of directors, it is possible to view the fiduciary duty pronouncements as being predicated upon these narrow factual grounds, but, curiously, neither the majority nor the dissent made any mention of it.[56]

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[53] *See supra* notes 49, 51 and accompanying text. The dissent argued unsuccessfully that the language relied on by the majority pertained only to *Revlon* scrutiny and was inapplicable under *Unocal*. *See supra* note 52 and accompanying text. However, the broad language used by the majority seems to indicate that, even under the business judgment rule, a contractual provision cannot define or limit a board's fiduciary duties.

[54] *See supra* notes 49, 51 and accompanying text. It is very possible that the majority reasoned that there was inherent injustice in two stockholders, who only controlled twenty percent of the stock, making decisions which essentially disenfranchised the other eighty percent of the stockholders. *See supra* notes 12, 40 and accompanying text.

[55] For example, in hindsight, the decision reached by the court in Omnicare appears to be shareholder friendly because, in the end, the NCS stockholders got the best deal available. *See supra* note 22 and accompanying text. However, without some deal protection measures in place, Genesis would have never conducted

V. CONCLUSION

It is unclear what the long-term implications will be for this rare three-two split decision in Delaware corporate law.[57] Indeed, the dissent in *Omnicare* openly hoped that the principles announced in the majority opinion would be narrowly constrained to the particular facts of the case.[58] Opponents of the decision have already begun to predict that the ruling will increase uncertainty in the bidding process and reduce the value of merger activity among Delaware corporations.[59] The potential increase in judicial review that is associated with the enhanced scrutiny of *Unocal* is an especially troubling aspect of the decision. By abandoning the business judgment rule and its accompanying deference to board actions with regard to

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negotiations with NCS in the first place, and there would have never been an Omnicare offer near the level eventually proposed. *See supra* note 15 and accompanying text.

[56] Chief Justice Veasey stated that he hoped the majority decision would be restricted to its facts but made no mention that the fiduciary duty pronouncements could be based on conflicts of interest between Outcalt and Shaw as majority stockholders and as half of the board of directors. *See infra* note 58 and accompanying text.

[57] "Split decisions by [the Delaware Supreme Court], especially in the field of corporation law, are few and far between." *Omnicare*, 818 A.2d at 939 n.90 (Veasey, C.J., dissenting) (citing controversial case of *Smith v. Van Gorkom* as one notable example). *But see* Randy Holland & David A. Skeel, Jr., *Deciding Cases Without Controversy*, 5 DEL. L. REV. 115, 118 (2002) (stating that while Delaware corporate law decision-making process fosters consensus, principled differences of opinion are never compromised for sake of unanimity).

[58] *Omnicare*, 818 A.2d at 946 (Veasey, C.J., dissenting). The Chief Justice referred to the majority opinion as "clearly erroneous" and hoped it would be viewed as "*sui generis.*" *Id.* (Veasey, C.J., dissenting).

[59] *Id.* (Veasey, C.J., dissenting). *See* Neimeth, *supra* note 48, at 16 (opining that *Omnicare* could cause some buyers to not put forth their best offer, for fear that subsequent superior offers will top them at last minute). Others are concerned that favoring corporate law fiduciary duty concerns over contract principles will increase uncertainty for all merger and acquisition transactions. *See supra* note 49 and accompanying text.

lock-up provisions, the court is surely inviting an increased amount of high-stakes litigation.[60]

The court's rigid application of *Unocal* is an unwarranted step away from the traditionally fact-specific decision-making process that is the hallmark of Delaware corporate law. Moreover, the court's fiduciary out requirement reduces the ability of a willing target corporation to receive valuable consideration in exchange for contractual provisions providing certainty to a bidder that its bid will not be topped at the last minute by a third party. The court is correct in that minority shareholders should receive protection against coercive and/or preclusive bids approved by the board of directors, but that protection should not go so far as to impair the right of the majority to vote their shares as they see fit.

However, *Omnicare* is a very peculiar factual situation, and these issues will almost certainly be the subject of litigation in the near future. With the recent retirement of Justice Joseph Walsh, a member of the three-person *Omnicare* majority, the swing vote on these important issues will rest with newly sworn in Justice and former Vice-Chancellor Jack Jacobs.[61] If the holding is limited to the specific facts of this case, then *Omnicare* will have no real effect on the merger industry. However, if the principles announced by the majority are applied broadly, then *Omnicare* will have sweeping consequences for both practitioners and boards of directors and could reduce the total value of all merger and acquisition activity for the shareholding public in general.

Brian C. Smith

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[60] *See supra* notes 32-34 and accompanying text. There will likely be future litigation concerning when a merger agreement is fully locked-up and whether a fiduciary out is required under the circumstances of a particular transaction in order for the board to comply with its fiduciary duties. *See supra* notes 48, 49 and accompanying text.

[61] Delaware Supreme Court Justices are nominated by the governor, confirmed by the Senate and serve twelve year terms. DEL. CONST. art. IV, § 3.

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